No. 91-1561

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

JAMES E. HUGHES, *et al.*,

Petitioners,

vs.

CONSOLIDATION COAL COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS M. TARASI, JR.
Counsel of Record
TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, Pennsylvania 15219
(412) 391-7135

DAVID C. HOOK
HOOK & HOOK
Fort Jackson Building
Waynesburg, Pennsylvania 15370
(412) 627-6146

Attorneys for Petitioners

1746
Lutz Appellate Printers, Inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED

1. Did not the District Court and the Third Circuit abuse their discretion in unconstitutionally denying just compensation to the petitioners?

2. Are not the Circuits creating different rigid time periods in their interpretations of what periods of time amounts to a pattern which is contrary to *H.J. Inc.'s* flexible approach and petitioners' case would have been decided differently by the courts sitting in the Sixth, Seventh and Second Circuits? The Third Circuit now holds that 12 months or 1 year of RICO violations are for free.

3. Did the District Judge and the Third Circuit have the constitutional power to grant judgment n.o.v. after a jury made specific findings of RICO violations?

LIST OF INTERESTED PARTIES

The petitioners are: James E. Hughes; Linda L. Hughes; Dorothy Loughman; Paul H. Kent; Mabel Kent; James C. McIntyre; Glenna McIntyre; Larry Levine; Dan Levine; Morris Levine; Edward Levine; Morris Levine Enterprises, Inc.; Levine Iron & Metal Inc.; John W. Yesensky Jr.; Linda M. Yesensky; Thomas J. Allen and Estate of John T. Throckmorton; Mark E. Headlee; and Charlotte B. Headlee.

The respondents are: Consol Pennsylvania Coal Company; Greenon Coal Company (formerly Rheinbraun U.S. Corporation); The Monongahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbaugesellschaft mbH; and Rheinbraun A.G.; William Reese; David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
A. Just Compensation	2
B. RICO	2
Statement of the Case	3
A. Factual Statement	3
B. Procedure	13
Reasons for Granting the Writ	15
I. Just Compensation	15
II. RICO	16

Contents

Page

A. The District Court and the Third Circuit Abused Their Discretion in Unconstitutionally Denying Just Compensation to the Petitioners. 18

B. The Circuits Are Creating Different Rigid Time Periods in Their Interpretations of What Period of Time Amounts to a Pattern Which Is Contrary to *H.J. Inc.*, Flexible Approach and Petitioners' Case Would Have Been Decided Differently by the Second, Sixth and Seventh Circuits. 20

C. Did the District Judge and the Third Circuit Have the Constitutional Power to Grant Judgment N.O.V. After a Jury Made Specific Findings of RICO Violations and Creates a Loophole for Future Violators. 25

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Barticheck v. Fidelity Union Bank/First National Bank, 832 F.2d 36 (3d Cir. 1987) 14

Chase Manhattan Bank N.A. v. Malatesta, CCH RICO Business Disputes Guide ¶ 7510 (S.D.N.Y. 1990) 17, 18, 21

Dyna Best Inc. v. Yao, 760 F. Supp. 704 (N.D. Ill. 1991) 18, 21

Contents

Page

H.J. Inc. v. Northwestern Tel. Co., 109 S. Ct. 2900 ....i, 14, 16, 17, 18, 20, 21, 22, 23, 28

Hughes v. Com. Dept. of Trans., 514 Pa. 300, 623 A.2d 747 (1987) 19

Hughes v. Consol Pennsylvania Coal Co., 945 F.2d 594 (3rd Cir. 1991) 1, 18, 21, 22, 24, 26

Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9 (3rd Cir.), cert. denied, 429 U.S. ____, 975 S. Ct. 396, 60 L. Ed. 2d 334 (1976) 25

Seaboard Air Line Railway Company, et al. v. United States, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1924) 15, 18

Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479 (1985) 16

Sun Savings and Loan Association v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 23

Swistock v. Jones, 884 F.2d 755 (1989) 24, 25

United States v. Blankenship, 543 F.2d 1272 at 1274 (9th Cir. 1976) 19

United States v. Busacca, 739 F. Supp. 370 (N.D. Ohio 1991) 17

Contents

Page

Statutes Cited:

18 U.S.C. § 1951(5) 16

18 U.S.C. § 1961, et seq. 2

18 U.S.C. § 1962, et seq. 3, 13

28 U.S.C. § 1254(i) (1988) 2

United States Constitution Cited:

Fifth Amendment 2, 18

Rule Cited:

Sup. Ct. R. 13.1 2

Other Authorities Cited:

Pa. Const. Art. 1, § 10 18

Pa. Const. Art. 10, § 4 18

Securities & RICO Update, January 1992, Michael A. Bertz, Esq. 25

Volume 84, Statutes at Large, Section 904 3

Contents

Page

APPENDIX

Appendix A — Amended Opinion and Order of the United States Court of Appeals for the Third Circuit Filed December 20, 1991 ..... 1a

Appendix B — Memorandum Order of the United States District Court for the Western District of Pennsylvania Dated June 18, 1990 ..... 70a

Appendix C — Memorandum of the United States District Court for the Western District of Pennsylvania Dated March 1, 1990 ..... 80a

Appendix D — Memorandum Opinion of United States District Court for the Western District of Pennsylvania Dated May 17, 1988 ..... 94a

Appendix E — Memorandum Opinion of the United States District Court for the Western District of Pennsylvania Dated October 22, 1987 ..... 104a

Appendix F — Verdict 118a

No.

In The

Supreme Court of the United States

October Term, 1991

JAMES E. HUGHES, *et al.*,

Petitioners,

vs.

CONSOLIDATION COAL COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The final decision of the United States District Court for the Western District of Pennsylvania on the matters at issue on this appeal was filed on March 1, 1990. It is set forth in Appendix, *infra* at 80a-93a, and has been officially reported at 740 F. Supp. 1114 (W.D. Pa. 1990). The opinion of the United States Court of Appeals for the Third Circuit, is reported at 945 F.2d 594 (3d Cir. 1991). The amended opinion of the United States

Court of Appeals for the Third Circuit of Pennsylvania dated December 20, 1991, on petition for rehearing is reproduced in Appendix, *infra* at 1a-69a (amended and restated opinion).

STATEMENT OF JURISDICTION

The amended judgment of the Court of Appeals was entered on December 20, 1991. This petition for a writ of certiorari was filed within 90 days of that date. Sup. Ct. R. 13.1. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(i) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Just Compensation

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . Nor shall private property be taken for public use, without just compensation.

B. RICO

The statutory provisions of Title 18, United States Code, § 1961, *et seq.*, Title IX (RICO) of P.L. 92-1452, in relevant part provides:

> § 1961. Definitions.
>
> As used in this chapter —
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which

occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

The relevant statutory provisions contained in Volume 84 of the Statutes at Large at 947 provides:

Section 904.

(a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

STATEMENT OF THE CASE

A. Factual Statement

This case does not involve a garden variety fraud perpetrated upon the petitioners and others. The facts and the conduct of these defendants read like a chapter from the history of the nineteenth century robber barons. The respondents used their huge and vast corporate powers and resources to threaten, defraud, and coerce the landowners in Greene County to sell their land, including in most cases their homes, to the respondents at

significantly depressed prices for use as railroad right-of-way property. These respondent corporations needed these rights-of-way to service two vast coal reserves they wished to exploit. One reserve is called the Manor Reserve, the other one the Nineveh Reserve.

There are two railroad rights-of-way involved in this scheme. One is the 14.5-mile rail line to the Manor coal reserve which is the subject of this suit. This rail line travels over the petitioners' former properties. The second is an unconstructed right-of-way for a 6-mile rail line from the Sycamore junction with the first rail line through the valley to Swartz, Pennsylvania and ultimately the Nineveh coal reserve. This rail line has not been constructed as of this date (TR1, 892-893, Ex. 137).

On August 4, 1977, Monongahela Railway Company (Monongahela)[1] identified to U.S. Steel, the then owner of the Manor reserve, the legal problems in acquiring the railroad right-of-way for the coal mines at the Manor coal reserve to a line of a railroad in Waynesburg, Pennsylvania (the 14.5-mile right-of-way involved in this action) (TR1, Ex. 13).[2]

Aware of the legal problems, Consolidation Coal Company (Consol) asked its attorney, Ewing Pollock, for his advice. On October 24, 1978, Pollock wrote and advised Consol that they should lay out the rail line and then "approach the property owners with a figure they can't refuse" (TR1, Ex. 220).[3]

---

1. In 1977 the United States Steel Corporation owned the rights to the Manor Coal Reserves. A few years later Consol acquired the rights to this reserve. Consol already had owned the rights to the Nineveh Coal Reserves.

2. TR1 refers to the trial record of the first trial.

3. Acquisition of property of petitioners Mark and Charlotte Headlee was (Cont'd)

On April 30, 1979 concerning the right-of-way to the Nineveh Coal Reserve (the unbuilt 6-mile right-of-way), Ewing Pollock advised Consol that without a right of condemnation,

> I do not think it possible for a corporation to build a railroad or pipeline today. Any intervening landowner would be able to hold up the purchase of such strip of ground.

(TR1, Ex. 40 page 2).

On March 5, 1980 Ewing Pollock advised Consol as follows:

> It is also my opinion that a coal company does not have the power of eminent domain and therefore would have to pay the price demanded to acquire right-of-way property for a railroad. *Therefore, if any railroad can be convinced to exert its right of eminent domain for the purchase of a right-of-way over which it will in the future haul freight from a coal operation, this would in the long run* be the *most economical,* the *quickest,* and from the point of view of public relations, the most desirable.

(TR1, Ex. 29 page 4).

This is exactly what defendants did. The whole acquisition

(Cont'd)
part of Consol's plans to acquire a right-of-way to either the Nineveh or Manor coal reserves. It lay in the way of both routes. Pollock, in his letters, notes that this property and the property of their neighbor, Grover Phillippi, could not be easily obtained (TR1, Ex. 220). Both properties in fact were obtained: Phillippi's by arm's length negotiations; Headlee's by fraud.

scheme of the approximately 52 properties involved in this case was a sham. Without the sham, as Pollock pointed out, the coal company would have to pay whatever price the landowners demanded for these rights-of-way.

On August 31, 1981, Consol received a letter opinion from its special counsel, Eugene Gulland of Covington & Burling in Washington, D.C. pointing out the serious problems involved in acquiring these rights-of-way. The opinion assumed a best case scenario concerning the land acquisitions and concluded that there was "a not insubstantial risk" that there would be no power of eminent domain under the circumstances. Gulland warned Consol that it was required to be completely truthful in acquiring the right-of-way land. In pertinent part, the letter said,

> The cases we have reviewed (including a number of Pennsylvania urban redevelopment cases) tend to confirm the principle that, *absent fraud and concealment,* the power to condemn should be judged on the basis of whether the ultimate use to which the land will be put is a valid public purpose. This is consistent with the analysis in our memorandum of 17 June 1981 and with what we have told you about the importance of making sure that all effected persons are *advised fully and truthfully about the circumstances surrounding Consol's efforts to acquire property for use as a railroad line by which Monongahela would serve the Manor mine.*

(Emphasis added) (TR1. Ex. 12 page 2).

In spite of this legal advice, Consol, having acquired the Manor and Nineveh coal reserves in Greene County, Pennsylvania, fraudulently acquired the needed railroad right-of-way to get the

coal from these reserves to market in this country and all over the world.

The corporate arrangements in this conspiracy were as follows: In December, 1980, an agreement to open the Manor and Nineveh coal reserves in Greene County was reached in Cologne, West Germany when Consol and Rheinishe Braunkohlenwerke, A.G. ("Rheinbraun, A.G.") signed a letter of intent to develop these reserves. The interests in the development project were Consol, 76%, Rheinbraun A.G. 24%. Ultimately, at a closing in October, 1981, an affiliate of Rheinbraun, A.G., Maria Theresia Bergbaugesellshaft MbH, entered into a partnership agreement with Consol to finance the project. The partnership subleased the reserves to a joint venture of two affiliate corporations, Consol Pennsylvania Coal Company and Rheinbraun U.S. Corporation. The joint venture was governed by the so-called OJV (operating joint venture) agreement (TR1, Ex. 5).

The over-all agreement was to develop and build five coal mines, for the Manor and Nineveh reserves, the first mine to be operational in 1983, possibly the second in 1987, and the others thereafter (TR1, Ex. 3). Consol and Rheinbraun are now acquiring, through Ewing Pollock, property for the 6 mile right-of-way to the Nineveh Reserve (TR1, 846). The map used at trial shows both these reserves with the present right-of-way built to the Manor Reserve. Also there physically lies on the ground a 200-foot unfinished section of the new 6-mile right-of-way to be built to service the Nineveh Reserve. The unfinished section was seen by the jury during a view.

In the summer of 1981, Consol made the arrangements suggested by Ewing Pollock in his 1980 letter, with the Monongahela, a nearly bankrupt railroad, to use the railroad's power of eminent domain to acquire land for the benefit of Consol

(and its partner) for the rail right-of-way from the proposed mine to the Monongahela's branch line in Waynesburg, Pennsylvania. Consol had made overtures to other railroads about a similar arrangement, but had been unable to reach an agreement because the railroads questioned the legality of the sham. Later, Consol, through another of its subsidiaries Consol Land Development Co., contacted the Upshur Agency, a West Virginia land service company, concerning providing of land agents to contact the landowners and acquire the land for the 14.5 mile rail right-of-way to the Manor Reserve.

At a meeting held on August 27, 1981, at Consol's headquarters in Library, Pennsylvania, representatives of Consol, Upshur and Monongahela met concerning the right-of-way project of 14.5 miles to the Manor Reserve. Notes of that meeting show that the second 6-mile right-of-way project, to the Nineveh Reserve, was also planned and discussed (Ex. 24). At that meeting all agreed that Upshur would acquire the right-of-way in the name of the Monongahela Railway Co. in trust for Consol Consol, would pay the landman, identify the properties to be acquired, and pay for all of the costs of the project including all costs of acquiring the property and the construction of the railroad.

On September 30, 1981, Consol, Monongahela and Upshur signed a Property Acquisition Agreement. This document memorialized the earlier understanding that Upshur was to acquire the land on behalf of Consol in the name of the Monongahela Railway Company (TR1, Ex. 1). The approximately fifty two (52) properties, which include the properties in issue in this proceeding, were acquired pursuant to this Property Acquisition Agreement. In March 1982, Consol, the railroad, and Upshur revised the Property Acquisition Agreement. A agreement signed two years later in 1984 makes clear that Consol owns the land and track and for the first time gives Monongahela certain operating rights over the track.

On October 29, 1981 after the construction of the rail line began, the Rheinbraun corporations discovered that there was some difficulty in acquiring the rights-of-way to get the coal from the reserves to the railroad and to market (specifically the Culp property). Rheinbraun insisted and received addendum to their overall agreements providing the following: If the right-of-way were not obtained in one year, they could withhold 12.5 million dollars of their 75 million dollar investment in the project, and further, they had the right each year thereafter, for four years, to withhold another 12.5 million dollars per year. At the end of *five years,* if the right-of-way was not obtained, they had the right to withdraw entirely from the project including their 75 million dollar investment (TR1, Ex. 3, Ex. 4, Ex. 5, Ex. 6).

Therefore time was crucial and of the essence in this fraudulent conspiracy. The Upshur Agency, day after day, represented to all the landowners that it dealt with, including the attorneys that they dealt with, that Consolidation Coal was not involved in this acquisition at all, and that only Monongahela Railroad Company was involved. *See. e.g.,* Consol arranged to have this falsehood told because it did not want the railroad's power of condemnation challenged since it feared that the arrangements would be held to be a sham — a private coal company using the railroad's power to condemn so as to fraudulently obtain the plaintiffs' property. Consol knew that legal proceedings challenging the arrangement could take years to resolve. Consol knew it only had *five years* to complete the acquisition or risk loss of an investor and a large investment of 75 million.

The Upshur Agency represented to all landowners that they would only receive a fixed price for their property if they dare challenge the acquisition (a lie) and that certain large portions of the money they received was tax free (another lie).

Defense counsel in his opening statement conceded the motive for haste and avoiding legal delays.

> And I am sure you have all heard, as we all have, the old saying that time is money, time is money. So that any delay when you have an investment of that magnitude, anything that delays the project, delays the day when the coal can be extracted form the ground and carried to market and sold, anything that delays that has a fierce cost attached to it, a hugh cost to delay the use of that investment to the time when it becomes profitable.

(TR1, 17-18).

We turn now briefly to show how Consol and its various agents displayed their way of doing business. They did this time and time again to landowners who brought this action and other landowners who testified at trial. Respondents did not present any evidence that they treated even one landowner honestly. Therefore the jury could infer this conduct was the same for all 52 property owners. A review of one case shows the respondents' techniques. Mark and Charlotte Headlee were a typical example of the respondents' way of doing business. In 1980, before Upshur was involved, Ewing Pollock approached the Headlees and asked if they would be interested in selling their property. The Headlees said no — even for a quarter of a million dollars.

Thereafter, in 1981, after years of planning this fraudulent scheme and when the Upshur Agency had been retained by the respondents, David Boggs,the Vice President of the Upshur Agency approached the Headlees. Mr. Boggs, in answer to a direct question, told the Headlees that he represented the Monongahela

Railway Company and no one else.[4] Boggs told the Headlees they (the railroad) had the power to take their property and pay only $700 an acre (TR1, 20), and "that they could put the railroad tracks within ten feet of our home", which would effectively destroy the value of their home (TR1, 27). Charlotte Headlee, fearing for the safety of her two small boys, asked about fencing and safety. Mr. Boggs said that safety was the Headlees' problem, that they had to build their own fence and that the railroad had no obligation in that regard.

Ultimately, Boggs offered $175,000 for their entire property. When the Headlees asked about seeing a lawyer, Boggs threw down his brief case and told them that all a lawyer would do is take their money, that seeing a lawyer would not get them any more money and that they better take the deal (TR1, 102).

Thereafter, Boggs returned to the Headlees, and told them that he could pay them only $168,000 for their property, and they had no choice but to take it. He told them that $108,000 would be tax free, a false statement. The frightened Headlees took Mr. Bogg's deal.

At the closing held at the offices of Pollock, Pollock & Thomas, Ewing Pollock's firm, the Headlees were told that they could not get $108,000 tax free, but instead only $28,000 was tax free. The rest would be taxable.[5] This statement even as to

---

4. Boggs had signed the Property Acquisition Agreement involving Consol, the railroad and Upshur. What Boggs said was demonstrably untrue, and he knew it.

5. The Headlees were audited by the Internal Revenue Service. They had to pay additional taxes and interest because none of the $28,000 was tax free. No penalties were paid, as Agent Revak of the IRS testified, because the landowners on the right-of-way were honest people who had been given the wrong information (TR1, 749-750).

the $28,000 was false.

The other landowners were lied to, threatened and coerced by the use of the same type of conduct and fraudulent techniques. The Yesenoskys, whose son was afflicted with acute asthma, were told that if they did not sell that they did not have a lawful access to their property. The Yesenoskys sold their 3.6 acre land for $67,000. The Levines, the owners of two small businesses, were told that with respondents' vast legal and financial resources they would "crush" the Levines. All of the landowners testified to similar threats and treatment. The properties were acquired in the name of "Monongahela Railroad Corporation" concealing the identity of the true acquirer Consol (which lacked the power of condemnation). The petitioners were told that if they refused to sell. Monongahela would exercise its power of eminent domain and give a fixed price per acre upon condemnation.

Only three landowners were knowledgeable as to the true, fair and correct market value for their property and dealt at arm's length: John Culp, Sarah Closser and Grover Phillippi. Culp, a professional land speculator purchased land in the right-of-way because it was right-of-way property. Grover Phillippi was represented by an assistant county solicitor who specializes in condemnation law, and Sarah Closser was represented by David Hook, a young lawyer who discovered by accident the massive fraud of defendants.[6] Culp received a million dollars for thirteen acres, Phillippi received $600,000 for five acres and a $160,000 siding, and Closser received $470,000 for two acres. Despite so many representations about the eminent domain power, *no land was ever condemned.*

Despite the proof of this scheme at trial and the 30-page

---

6. Sarah Closser did not sell to the railroad. She sold her land directly to Consol and Rheinbraun (through their affiliates) (TR1, Ex. 102).

verdict slip consisting of 539 written interrogatories which the jury answered consistently and found that respondents committed acts in violation of 18 U.S.C. § 1962, *et seq.*, the District Court and Circuit Court found in reversing the jurys' verdict that "defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most." (50a).

B. Procedure

On April 19, 1983, nine petitioners filed eight complaints against Consol; Consol-Pa, Consol Land Development Company; Monongahela; RBW; MTB; Ewing Pollock, Esquire; his law firm, Pollock, Pollock & Thomas; Upshur; and Upshur agents David Boggs, William Reese and Mike Wilson. Plaintiffs alleged violations of RICO, civil conspiracy and common law fraud. One petitioner, Dorothy Loughman, also alleged attorney malpractice against Pollock. All eight complaints were consolidated for trial purposes.

Respondents moved for partial summary judgment on petitioners' claim that Upshur agents misrepresented Monongahela's power of eminent domain. They contended Monongahela had the power to condemn petitioners' properties. On August 6, 1987, the District Court granted respondents' motion, but sent the remaining claims of fraudulent misrepresentation, RICO violations, and civil conspiracy to the jury. The *jury was given* and *filled out consistently, a 30-page verdict slip consisting of 539 written interrogatories* (Appendix 118a). The jury was also given pertinent portions of the RICO statute during their deliberations. The jury found all of the respondents liable except William Reese and Mike Wilson, and awarded $5,360,500 in compensatory damages, trebled under RICO. It also awarded $5,500,000 in punitive damage because it found respondents acted outrageously.

Respondents moved for judgment n.o.v. on all claims. On October 22, 1987, the District Court granted respondents' motion for the RICO claims for it concluded petitioners failed to satisfy RICO's "continuity" requirement. It also set aside the compensatory damage award as excessive. The court suggested remittitur, but when defendants made no offer to settle, the Court ordered a new trial on damages only. On the basis of the *Barticheck*[7] decision of the Third Circuit, petitioners moved for a reconsideration of the District Court's orders. On May 17, 1988, the court reinstated the RICO verdicts, vacating in part its October 22, 1987 grant of judgment n.o.v. On June 9, 1988, it decided not to submit the issue of punitive damages to a second jury. The court granted the petitioners delay damages (interest).

However, on November 20, 1989, before the start of the second trial.[8] respondents, on the basis of this Court's decision in *H.J. Inc.* moved to vacate the May 17, 1988, order that vacated the judgment n.o.v. of October 22, 1987 and reinstated the RICO claim. On March 1, 1990, five days before the scheduled re-trial on damages the court granted respondents' motion to vacate the May 17, 1988 order, reinstated the October 22, 1987 grant of judgment n.o.v. on the RICO claim, and ordered retrial of the punitive damages issue without any order vacating the original punitive damage verdict.

In the second trial on damages, the jury awarded petitioners $4,272,677 in compensatory damages and $674,000 in punitive damages. The respondents moved for judgment n.o.v., new trial, and reargument. The District Court denied these motions. The

---

7. *Barticheck v. Fidelity Union Bank/First National Bank*, 832 F.2d 36 (3d Cir. 1987).

8. By November 20, 1989, the Honorable D. Brooks Smith had been assigned to this case. Judge Teitelbaum had retired.

judge at the second trial reversed the first judge and denied petitioners delay damages (interest). Both parties filed timely appeals.

On September 20, 1991 the Third Circuit per Sloviter, C.J., Nygard and Katz rendered their initial decision in this matter. The Third Circuit court reinstated the first damage award, and concluded that the first punitive damage award was adequately supported by the record. The Third Circuit concluded that petitioners were not entitled to either prejudgment interest or delay damages and that the District Court properly granted judgment n.o.v. on the RICO claim since the continuity requirement was not satisfied. Furthermore, the Third Circuit concluded that the District Court properly granted partial summary judgment, holding that as a mater of law Monongahela had eminent domain powers. Finally the Third Circuit concluded that the District Court properly instructed the jury on the law of misrepresentation, the plaintiffs could have justifiably relied on the statements made by the Upshur agents and that the District Court erred by granting judgment n.o.v. on the legal malpractice claim and the District Court's remark did not deprive respondents of a fair trial.

REASONS FOR GRANTING THE WRIT

I.

JUST COMPENSATION

The holding of the Third Circuit denying petitioners delay damages is an unconstitutional denial of just compensation since it denies a property owner interest on property acquired pursuant to a condemnation scheme and therefore conflicts with this Court's decision in *Seaboard.*[9] In *Seaboard* this Court determined that

---

9. *Seaboard Air Line Railway Company, et al. v. United States,* 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1924).

just compensation is the full and perfect equivalent of the property taken and must put the property owner in the same financial position as he would have been if his property had not been taken. Furthermore this Court stated that interest is necessary to have just compensation. In addition to being contrary to well established authority, with this case as the precedent on the issue of delay damages, fraud pays since lawful condemnation requires payment of delay damages but fraudulent takings using threats of condemnation do not. Such a precedent encourages fraud, threats and extortion and discourages fraudulent defendants from complying with the statutory procedure for eminent domain takings.

II.

RICO

In order to establish a RICO cause of action, four elements must be proven. These elements are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Of these elements, at issue in the case at bar is whether petitioners proved at trial that the respondents had engaged in a "pattern of racketeering activity." Under RICO, a pattern "requires at least two acts of racketeering activity one of wbich occurred after the affective date of this chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity. . . ." 18 U.S.C. § 1951(5). In *H.J. Inc.*, this Court stated:

> A "pattern" is an arrangement or order of things or activity [citation], and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship they bear to each other or to some external organizing

> principle that renders them "ordered" or "arranged".

109 S. Ct. at 2900.

In conclusion this Court stated in *H.J. Inc.*:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the *per se* methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity exists."

109 S. Ct. at 2902.

This Court in *H.J. Inc.* stated that "acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement," and referred to Congress' concern with long-term criminal conduct. 109 S. Ct. at 2902. This Court also made clear that where continuity cannot be established in this way, liability will depend upon "whether the *threat* of continuity is demonstrated." *Ibid.* (Emphasis by the Court.)

However, the Circuit Courts are developing a pattern analysis under RICO that uses rigid time limits. Moreover, they do not agree on the different times to be used to determine what constitutes a substantial period. Courts have created four approaches in determining what amounts to a showing of a pattern for RICO purposes. These are the "totality of the circumstances", the "goal and/or inferred threat", the "factually oriented analysis and the draconian theory lacking flexibility." *United States v. Busacca*, 739 F. Supp. 370 (N.D. Ohio 1991) "totality of the circumstances"; *Chase Manhattan Bank N.A. v. Malatesta*, CCH

RICO Business Disputes Guide ¶ 7510 (S.D.N.Y. 1990) "goal and/or inferred threat"; *Dyna Best Inc. v. Yao,* 760 F. Supp. 704 (N.D. Ill. 1991) "factually oriented analysis"; and *Hughes v. Consol Pennsylvania Coal Co.,* 945 F.2d 594 (3rd Cir. 1991) "draconian theory lacking flexibility". This conflict has led to an intolerable situation imposed upon, litigants and courts interpreting what constitutes a "substantial period" for purposes of proving a pattern. None of the opinions of the Circuit or District Courts can be reconciled. Although this Court in *H.J. Inc.* openly welcomed the courts to define pattern we are sure it did not invite chaos. In the case at bar, under existing precedent, petitioners would have had their RICO verdict upheld in other Circuit and District Courts. The Third Circuit now allows one year of RICO violations without penalty.

A. The District Court and the Third Circuit Abused Their Discretion in Unconstitutionally Denying Just Compensation to the Petitioners.

Private property shall not be taken for public use without just compensation. U.S. Const., Amend. V. Just compensation is provided for by the Constitution and its ascertainment is a judicial function. In *Seaboard* this Court held that interest at a proper rate is necessary in order for a property owner not to suffer loss and to have just compensation to which he is entitled. 261 U.S. at 307. Petitioners had their property taken under the threat of eminent domain by a party the lower court and Third Circuit held had the power of eminent domain. Given this ruling, the consequence of respondents' proven fraud enables respondents to acquire petitioners' land without paying just compensation as required by the Fifth Amendment, and as required under the Constitution of the Commonwealth of Pennsylvania. Pa. Const., Art. 1, § 10 and Art. 10, § 4.

The jury verdict awarding compensatory damages of

$5,360,500 divided among nine properties taken under the threat of eminent domain was the market value of the property taken. This award did not include delay damages. The Honorable Hubert I. Teitelbaum ruled delay damages would be payable (106a). The Honorable D. Brooks Smith reversed Judge Teitelbaum (76a-77a). Under Pennsylvania and United States constitutional protection, just compensation must include interest, *i.e.*, delay damages in Pennsylvania. *Cf. Hughes v. Com. Dept. of Trans.*, 514 Pa. 300, 623 A.2d 747 (1987) wherein the Pennsylvania Supreme Court ordered delay interest at the prevailing commercial rate.

As just compensation under both federal and Pennsylvania state constitutional standards requires interest from the date of taking, petitioners are entitled to the same. *See United States v. Blankenship*, 543 F.2d 1272 at 1274 (9th Cir. 1976). The refusal to award such interest denies petitioners the basic constitutional protection against a state-authorized involuntary taking without just compensation.

Respondents now are rewarded for their fraudulent conduct. They have acquired the right-of-way quickly without the delay of eminent domain proceedings. They have saved money and they do not have to pay delay interest as is required by eminent domain law.

Petitioners, the victims of this fraudulent conduct, are awarded less than they would receive in an eminent domain proceeding as the lower courts, unconstitutionally, have deprived them of delay interest. Surely this is a precedent instructing malefactors to ignore the law. The Court must correct this injustice.

B. The Circuits Are Creating Different Rigid Time Periods in Their Interpretations of What Period of Time Amounts to a Pattern Which Is Contrary to *H.J. Inc.*, Flexible Approach and Petitioners' Case Would Have Been Decided Differently by the Second, Sixth and Seventh Circuits.

In *H.J. Inc,* this Supreme Court commenced its discussion of the concept of "pattern" of conduct by stating:

> [W]e must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." [Citation.] In normal usage, the word "pattern" here would be taken to require more than just a multiplicity of racketeering predicates. A "pattern" is an "arrangement or order of things or activity," [citation], and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."

109 S. Ct. at 2900.

This Court then noted that both the text of the RICO statute and the legislative history reflect that Congress meant to take a "flexible" attitude toward whether a pattern of conduct exists in a particular situation.

This Court continued its discussion of this concept by stating that, "Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of the case," and by discussing a series of "examples of how this

element might be satisfied." *Id.* at 2902.

In conclusion, this Court stated in *H.J. Inc.*:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.

From these references to a "flexible" approach to the determination of whether a "pattern" exists, to an "arrangement or order" to the activities, to the need to look to "the specific facts of the case," and to examples discussed as being illustrative of how the element of pattern "might" be satisfied, it should be apparent that the issue of whether this element of a RICO claim has been satisfied *should be for the jury to determine* in any case where a reasonable jury could find a "pattern" to exist from evidence which may be brought forth at trial.

Although this Court in *H.J. Inc.* openly welcomed the Circuit Courts to define pattern, this Court also suggested a flexible approach to the determination of whether a "pattern" exists. This Court suggested the need to look to the specific facts of the case to determine if there exists an "arrangement or order" to the activities. The courts are disregarding the context in which the examples were discussed. Some of the approaches do look at the facts to determine if there exists an "arrangement or order." *Busacca,* two and one half months, shows a pattern under the theory of "totality of the circumstances"; *Chase Manhattan Bank,* thirty days, shows a pattern under the theory of "goal and/or inferred threat"; *Dyna Best,* one year, shows a pattern under the "factually oriented" analysis. In *Hughes,* one year was not a

pattern under a draconian theory lacking flexibility. In the case at bar under existing precedent, petitioners would have had their RICO verdict upheld in other Circuit and District Courts. The Third Circuit now allows one year of RICO violations without penalty.

The Third Circuit in the case at bar did not analyze whether any "order" or "arrangement' of activity had been shown from the manner in which the defendants dealt with at least 52 separate landowners in the acquisition of more than 60 parcels of land for use in building a railroad spur to mining property being developed by the defandants. Rather, the court focused upon the fact that the "defendants had but one area to acquire," and after acquiring that property "they posed no future threat to plaintiffs or society," and upon a draconian legal conclusion held that "twelve months is not a substantial period of time" for RICO purposes (50a). 945 F.2d at 610-611. The Third Circuit stated:

> In short, defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most.

(50a).

This Supreme Court in *H.J. Inc.* had, in fact, referred to "continuity" as a "temporal" concept, discussed "predicates extending over a substantial period of time," stated that "acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement," and referred to Congress' concern with "long term criminal conduct." 109 S. Ct. at 2902. However, this Court also made clear that where continuity cannot be established in this way, liability will depend upon "whether the *threat* of continuity is demonstrated." *Ibid.* (Emphasis theirs.)

An appropriate test for whether the threat of continuity is demonstrated was stated in *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187, 194, n.5. (9th Cir. 1987), the year petitioners tried this case and prior to *H.J. Inc.*:

> The fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity. *As long as a threat of continuing activity exists at some point during* the racketeering activity, the continuity requirement is satisfied.

After the fourth, fifth or sixth landowner had been approached through the fraudulent conduct by which the respondents' sought to obtain parcels of land at significantly depressed prices, some "order" or "arrangement" to respondents' conduct certainly existed. Moreover, at that point a threat certainly existed that respondents would similarly seek to defraud the balance of the landowners who owned parcels needed by respondents.

In focusing on the completion of the property acquisitions within one year, the Third Circuit disregarded the evidence of the five-year agreement among certain defendants-respondents who were financing the project. These respondents required a provision in the agreement, among them that funds totaling 12.5 million a year they were to contribute to the venture would be withheld as each year passed without completion of these acquisitions, and that they could "*withdraw entirely from the venture*" "*[i]f the rights of way were not purchased after five-years*" (41a).

In fact, the short time involved in this case may be more of an attestation to the egregious manner in which respondents engaged in their fraudulent conduct causing sellers to capitulate faster than anticipated, and allowing the soliciting respondents

to go on to the next landowner sooner — than to any limitation of the threat of continued unlawful activities.

Furthermore the Third Circuit ignored the evidence that Consol plans to build a second 6-mile track line to the Nineveh Coal Reserve. The jury could infer that but for the petitioners filing this lawsuit these rights-of-way would have been acquired by the same fraudulent means of doing business. In the future, with the *Hughes* case as the law, these rights-of-way can be acquired in the same fraudulent way within a one-year time period without any RICO violations.

Finally, the false premise relied upon by the Third Circuit in characterizing the conduct as a "single-victim (albeit class of victims) operation" involves a classic Catch-22, which disregards the fact that no familial or business relationship existed among the 12 selling landowners. This type of reasoning, when applied to distinct and separate victims, could lead to the incongruous conclusion that the more closely related the type of victims are to one another — satisfying the relatedness test — the more likely they would be deemed a "single-victim," thereby thwarting satisfaction of the continuity test. This result is also in direct conflict with this Court's "flexible" approach to be applied to the concept of "pattern" of unlawful conduct.

In an earlier opinion the Third Circuit held that continuity existed where the racketeering activity lasted only 14 months, and other potential transactions raised the issue of whether fraud was a regular way of defendants doing business. *See Swistock v. Jones*, 884 F.2d 755, 769 (1989). There the court stated:

> Although the Court in *H.J. Inc.*, did not explicitly hold that the existence of a RICO pattern was a jury question, the Court held that the district court had improperly dismissed plaintiffs' RICO claim

> because "a threat of continuity of racketeering activity *might be established at trial* by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business." 109 S.Ct. at 2906 (emphasis added).

884 F.2d at 758.

As important as time may be in considering whether there is any "order" or "arrangement" to the conduct of the defendants such that a "pattern" of conduct will exist, so long as the pleadings show racketeering activity over some period of time and potential future wrongdoing at any time during the unlawful conduct, a plaintiff should have the opportunity to develop that part of the case and to present evidence to a properly instructed jury for decision. It is not for the Circuit Courts to rigidly interpret what period of time amounts to a pattern. Pattern under the RICO statute is a jury question and the 30-page verdict slip consisting of 539 interrogatory questions answered correctly should stand.[10]

C. Did the District Judge and the Third Circuit Have the Constitutional Power to Grant Judgment N.0.V After a Jury Made Specific Findings of RICO Violations and Creates a Loophole for Future Violators.

When a trial court reverses an issue after it was properly submitted to the jury, it may deny the non-moving party of his Seventh Amendment rights. *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. ____, 975 S. Ct. 396, 60 L. Ed. 2d 334 (1976).

In reaching its decision to disregard the jury's finding of

---

10. *Cf.*, *Securities & RICO Update*, January 1992, Michael A. Bertz, Esquire.

culpability and finding of a pattern under the RICO Statute the Court stated:

> As to open-ended scheme, we find no evidence that defendants used fraud as a regular way of doing business or formed an on going criminal association . . . . *There were no "potential" areas of interest.* Once defendants obtained the property, they posed no future threat to plaintiffs or society. The defendants' fraud was not akin to the type where hoodlums sell "insurance" to store keepers to cover them against breakage of their windows, telling their victims they would return each month to collect their "premiums". *H.J. Inc.*, 492 U.S. at 242.
>
> Theirs was akin to a one time racket to obtain specific bounty. We find no continuity under an open-ended scheme.

Hughes, et al. v. Consolidation Coal Co. (emphasis added).

These conclusions by the Third Circuit mischaracterize the evidence supporting the jury's findings on continuity and future threats of RICO violations. The evidence was clear that these fraudulent methods (lies, intimidation and coercion) towards the approximately 52 landowners along the route of the Manor reserve is the preferred way of doing business by the defendants because these methods work quickly and cheaply. Furthermore there have been actual steps taken to acquire the property to the Nineveh reserve by Ewing Pollock and the defendants presented no evidence that the same pattern of fraud was not used, therefore the jury may infer that the same methods were and will be used. Given the evidence of the same objectives to be accomplished in the future, *i.e.*, the 6-mile right-of-way to the Nineveh reserve which

is the "potential area of interest" the jury clearly decided this was an open-ended scheme.

Moreover, during the first trial the jury was taken by bus to Greene County for a view of the entire length of the railroad and plaintiffs' properties. This was done to permit the jury to consider the view with what they would hear on the witness stand and to understand the exhibits introduced into evidence. During that view the jury physically saw the "future threat" of fraudulent conduct at the junction at Sycamore where there lies a 200-foot unfinished railroad line pointing toward the Nineveh Reserve. This second railroad line has yet to be built. However, as early as the meeting of June 10, 1981, as reflected in the notes of that meeting (TR2, Ex. 24), these conspirators and party defendants plan to build a second railroad line after 1983 to what is called the Nineveh Reserve. For this right-of-way the defendants only intend to pay a fixed amount for the properties they will have to acquire to finish this second railroad line (TR1, Ex. 126; TR1, Ex. 137). Clearly a jury could infer that this is a future threat.

Testimony was elicited from Mr. Kaush of the German defendants, that the same tactic used by Consol in this instance was used by Consol to obtain right-of-way property for a Utah mine (TR1, 1364). Defendant Ewing Pollock testified that the defendants are going to construct the second railroad line, the 6-mile line to the other coal reserve at Nineveh (TR, 892-893).

Finally, the charge given to the jury, which was as follows:

> If you find that the conduct of defendants was outrageous, you may award punitive damages as well as compensatory damages in order to punish said defendants for their conduct and *to deter the defendants* and others from the commission of like acts

(TR1, 2615) (emphasis added), resulted in a 6.5 million dollar punitive damage award. The jury clearly believed that there was and *remains* that *threat of continued criminal activity* as described by this Court in *H.J. Inc.*, 109 S. Ct. 2893 (1989). The facts in this case are so strong concerning the issue of pattern and the threat of continued criminal activity that if this case is the law it can be used by any defendant, criminal or civil, to avoid RICO violations so long as they structure their illegal and criminal activities to a short time to obtain a specific bounty even though future activity is threatened. What the Third Circuit held was 12 months or 1 year of RICO activity are for free whether it be a one-time contract to commit murder, or import drugs, does not matter just so the contracts are structured properly and completed within one year even though the threat of repetition by the same defendants exists.

This case also, takes the question of pattern away from the jury after the jury verdict is rendered. Clearly this was not the intent of this Court in *H.J. Inc.* nor was it the intent of Congress when the RICO statute was enacted.

In this case, where there are numerous facts establishing continuity, the petitioners have been denied their Seventh Amendment rights. The Third Circuit failed to address these numerous facts pointed out in the argument above indicating future conduct. The Third Circuit's timeframe, extending from the first petitioner's acquisition to the last property acquired, ignores facts of earlier planning, meetings, agreements, a five-year timeframe in agreement and predicate acts of retaliation and reward as late as 1984 providing a four-year timeframe of activity. Likewise, the future acquisition of the Nineveh Spur was shown. It is an abuse of discretion for the Third Circuit to overrule the jury's analysis of these facts. There is evidence of an extensive timeframe for the bad conduct and evidence of future bad acts being likely. Continuity as required by RICO has been established. The jury in the first trial was correct.

CONCLUSION

Resolution of the foregoing problems is needed by this Court. The instant case is an ideal case to effectuate that resolution. This, unlike many RICO actions, is not a simple variety fraud case, rather the evidence at trail showed a history of overwhelming and unchecked corporate tyranny and oppression. This Court must set forth a rule of law to both the law on just compensation and the RICO statute. Only by so doing will the law of just compensation be restored and the current confusion of law in RICO cases be ended.

Respectfully submitted,

LOUIS M. TARASI, JR.
TARASI & JOHNSON, P.C.
Attorneys for Petitioners

APPENDIX A — AMENDED OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 20, 1991

Filed December 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3466

JAMES E. HUGHES and LINDA L. HUGHES,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL CO.;
CONSOL-LAND DEVELOPMENT CO.
MARIA THERESIA BERGBAUGESELLSCHAFT MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3467

DOROTHY LOUGHMAN,

Appendix A

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT. AND MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3468

PAUL H. KENT and MABEL KENT,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a

corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3469

JAMES C. McINTYRE and GLENNA McINTYRE,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;

Appendix A

RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

No. 90-3470

LARRY LEVINE, DAN LEVINE, MORRIS LEVINE,
EDWARD LEVINE, individuals; and
MORRIS LEVINE ENTERPRISES, INC., a
corporation;
and LEVINE IRON AND METAL, INC., a
corporation,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and

Appendix A

MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
HEINISCHE BRAUNKOHLENWERKE

No. 90-3471

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE
Consol-Pennsylvania Coal Company,
Consolidated Coal Co.,
Consol-Land Development Company, and
The Monongahela Railway Company,

Appendix A

Appellants

No. 90-3472

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation, Maria Theresia Bergbaugesellschaft MBH, and Rheinische Braunkohlenwerke,

Appellants

Appendix A

No. 91-3473

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

David Boggs, an individual,
The Upshur Agency, Inc.,
William Reese, an individual,
Mike Wilson, an individual,

Appellants

Appendix A

No. 90-3474

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company,
Consolidated Coal Company,
Consol-Land Development Company, and the Monongahela Railway Company,

Appellants

Appendix A

No. 90-3475

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation, Maria Theresia Bergbaugesellschaft, MBH, and Rheinische Braunkohlenwerke,

Appellants

Appendix A

No. 90-3476

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company, a corporation,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

Appendix A

No. 90-3477

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3478

JAMES C. McINTYRE and GLENNA McINTYRE

Appendix A

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company, a corporation,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3479

JAMES C. McINTYRE and GLENNA McINTYRE

V.

Appendix A

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3480

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE; EDWARD LEVINE; MORRIS LEVINE ENTERPRISES; LEVINE IRON & METAL

V.

Appendix A

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3481

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE; EDWARD LEVINE; MORRIS LEVINE ENTERPRISES; LEVINE IRON & METAL

V.

Appendix A

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3482

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;

Appendix A

EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a
corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3483

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;

Appendix A

CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3484

THOMAS J. ALLEN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

No. 90-3485

THOMAS J. ALLEN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

No. 90-3494

DOROTHY LOUGHMAN

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

Appendix A

No. 90-3495

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

No. 90-3496

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

Appendix A

No. 90-3497

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

Appendix A

No. 90-3498

PAUL H. KENT and MABEL KENT

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3499

PAUL H. KENT and MABEL KENT

V.

Appendix A

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

No. 90-3500

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;

Appendix A

JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3501

JAMES C. McINTYRE and GLENNA McINTYRE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND

Appendix A

THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs,
The Upshur Agency, Inc.,

Appellants

No. 90-3502

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE;
EDWARD LEVINE; MORRIS LEVINE
ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a
corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a
corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and
the law firm of POLLOCK, POLLOCK AND
THOMAS;
THE UPSHUR AGENCY, INC.;

Appendix A

CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3503

LARRY LEVINE; DAN LEVINE; MORRIS LEVINE;
EDWARD LEVINE; MORRIS LEVINE
ENTERPRISES; LEVINE IRON & METAL

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;

Appendix A

CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT,
MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs,
The Upshur Agency, Inc.,

Appellants

No. 90-3504

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

No. 90-3505

JAMES HUGHES and LINDA HUGHES

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

Appendix A

No. 90-3506

MARK E. HEADLEE and CHARLOTTE B. HEADLEE,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

No. 90-3507

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Consol-Pennsylvania Coal Company, a corporation,
Monongahela Railway Company,
Consolidated Coal Company,
Consol-Land Development Company,

Appellants

Appendix A

No. 90-3508

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE
Rhein Braun U.S., a corporation,
Maria Theresia Bergbaugesellschaft MBH,
Rheinische Braunkohlenwerke,

Appellants

Appendix A

No. 90-3509

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

Appendix A

No. 90-3510

MARK E. HEADLEE and CHARLOTTE B. HEADLEE

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

Appendix A

No. 90-3511

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Appendix A

No. 90-3512

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Ewing Pollock, and Pollock, Pollock and Thomas,

Appellants

Appendix A

No. 90-3513

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation;
RHEIN BRAUN U.S., a corporation;
MONONGAHELA RAILWAY COMPANY, a corporation;
MIKE WILSON, an individual;
WILLIAM REESE, an individual;
JAMES LEACH, an individual;
DAVID BOGGS, an individual;
EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS;
THE UPSHUR AGENCY, INC.;
CONSOLIDATED COAL COMPANY;
CONSOL-LAND DEVELOPMENT COMPANY;
RHEINBRAUN VERKAUFSGESELLSCHAFT, MBLT
and
MARIA THERESE VERKAUFSGESELLSCHAFT;
MARIA THERESIA BERGBAUGESELLSCHAFT, MBH &
RHEINISCHE BRAUNKOHLENWERKE

Mike Wilson, William Reese, David Boggs, The Upshur Agency, Inc.,

Appellants

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 83-00921, 83-01674, 83-01675, 83-01676, 83-01677, 83-01678, 83-01679, 83-01754)

Argued January 28, 1991

Before: SLOVITER, *Chief Judge*; NYGAARD, *Circuit Judge* and KATZ, *District Judge**

(Opinion Filed December 20, 1991)

LOUIS M. TARASI, JR., ESQUIRE (argued)
JOSEPH J. HINCHLIFFE, ESQUIRE
Tarasi & Johnson
510 Third Avenue
Pittsburgh, PA 15219
DAVID C. HOOK, ESQUIRE
Hook & Hook
P.O. Box 792
Waynesburg, PA 15370
Attorneys for Appellants in
Nos. 90-3466, 90-3467, 90-3468,
90-3469, 90-3470, 90-3495,
90-3506, 90-3511

JOSEPH A. KATARINCIC, ESQUIRE (argued)
Katarincic & Salmon
625 Liberty Avenue
2600 CNG Tower

* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Pittsburgh, PA 15222
Attorney for Appellants in
Nos. 90-3471, 90-3474, 90-3476
90-3478, 90-3480, 90-3482,
90-3484, 90-3507

JOSEPH D. BECKER, ESQUIRE (argued)
Becker, Glynn & Melamed
299 Park Avenue
New York, NY 10171
Attorney for Appellants in
Nos. 90-3472, 90-3475, 90-3477
90-3479, 90-3481, 90-3483
90-3485, 90-3508

JAMES F. MANLEY, ESQUIRE (argued)
Burns, Manley & Little
2922 Gulf Tower
Pittsburgh, PA 15219
Attorney for Appellants in
Nos. 90-3473, 90-3497, 90-3499
90-3501, 90-3503, 90-3505,
90-3510, 90-3513

KATHRYN L.SIMPSON, ESQUIRE (argued)
VINCENT J. GROGAN, ESQUIRE
Grogan, Graffam, McGinley
& Lucchino
Three Gateway Center
22nd Floor
Pittsburgh, PA 15222
Attorney for Appellants in
Nos. 90-3494, 90-3496, 90-3498
90-3500, 90-3502, 90-3504,

Appendix A

90-3509, 90-3512

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

These consolidated appeals arise from a series of complaints filed by plaintiffs after Monongahela Railway Company acquired their properties and rights-of-way in trust for Consolidated Coal Company, for it to construct and operate a 14.5 mile track from a coal mine to Monongahela's main line. Plaintiffs allege that defendants, Monongahela and Consolidated Coal, among others, fraudulently misrepresented facts to obtain favorable prices. They sought lost profits on theories of civil conspiracy, common law fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*

I. FACTS AND PROCEDURE

Consolidated Coal Company (Consol) acquired the Nineveh and Manor coal reserves located in Greene County, Pennsylvania. To exploit these reserves, it needed railroad rights-of-way. In December 1980, Consol signed a letter of intent with Rheinische Braunkohlenwerke A.G. (RBW) to form a joint venture to develop these mining reserves. On June 30, 1981, their affiliates, Consol-Pennsylvania Coal Company (Consol-PA) and Rheinbraun U.S. Corporation, signed an "Operating Joint Venture Agreement". On October 29, 1981, Consol and Maria Theresia Bergbaugesellshaft (MTB), a RBW subsidiary, formed Conrhein Coal Company, a partnership.

Conrhein subleased the reserves to the joint venture of Consol-PA and Rheinbraun U.S. These affiliates held the reserves as tenants in common.

The coal reserves are located about 14.5 miles from Monongahela Railroad Company's (Monongahela) main line. Consol needed a spur railroad to transport coal from the reserves. On September 30, 1981, Consol and Monongahela signed a "Property Acquisition Agreement". They agreed that Monongahela would use the railroad's eminent domain power to acquire more than fifty parcels of land owned by plaintiffs and other landowners in the "Areas of Interest". Monongahela would hold any land it acquired in trust for Consol. In the same agreement, Monongahela and Consol contracted with Upshur Agency, a real estate broker. Upshur agreed to negotiate with plaintiffs for the needed rights-of-way.

The Rheinbraun corporations were concerned that Consol would be unable to purchase the needed rights-of-way to transport the coal to the various markets. Consequently, addenda were added to their agreements. They provide that Rheinbraun could withhold $12.5 million of its $75 million total investment in the venture for each year that passed before Consol obtained the rights-of-way. If the rights-of-way were not purchased after five years, Rheinbraun could withdraw entirely from the venture.

Time was crucial. The scheme to defraud plaintiffs unfolded as follows. Upshur agents acquired the properties from plaintiffs "in the name of 'Monongahela Railroad Corporation,'" concealing the identity of the true acquirer Consol (which lacked condemnation power). App. at 1160A. Upshur told plaintiffs that if they refused

to sell Monongahela would exercise its power of eminent domain and give a fixed price per acre upon condemnation.

Following this scheme, Upshur agents approached plaintiffs and negotiated for the needed rights-of-way. Plaintiffs sold parcels to Monongahela. When some plaintiffs initially refused or hesitated, Upshur agents made thinly-veiled threats to induce them to sell. For example, an Upshur agent threatened to bring condemnation proceedings against James and Linda Hughes. The Hughes sold their 1.5 acre land for $90,000. An Upshur agent threatened to condemn Mark and Charlotte Headlee's property for $700 per acre. The Headlees sold their 26 acre land for $168,000. An Upshur agent threatened John and Linda Yesenosky, whose son was afflicted with acute asthma, that trains could be parked across their driveway. The Yesenoskys sold their 3.6 acre land for $67,000. In some of these instances, either Upshur agents or defendant attorneys told plaintiffs that part of the purchase price would be tax free.

Among the landowners, five — Grover and Imogene Phillippi, John and Sharon Culp, and Sarah Closser — either discovered Consol's undisclosed role or were land speculators. Upon the advice of their attorneys, they refused to accept Upshur's original purchase offers. Because these landowners were fully informed and on equal footing with the defendants, Upshur agents were forced to pay substantially higher prices. Specifically, the Phillippis sold 5.2 acres for $600,000 plus the installation of railroad siding. The Culps sold 13.3 acres for $1 million. And Closser sold 1.9 acres for $445,000.

Appendix A

On April 19, 1983, nine plaintiffs filed eight complaints against Consol, Consol-PA, Consol Land Development Company, Monongahela, RBW, MTB, Ewing Pollock, Esq., his law firm, Upshur, and Upshur agents David Boggs, William Reese and Mike Wilson. Plaintiffs alleged violations of RICO, civil conspiracy, and common law fraud. One plaintiff, Dorothy Loughman, also alleged attorney malpractice against Pollock. All eight complaints were consolidated for trial purposes.

Defendants moved for partial summary judgment on plaintiffs' claim that Upshur agents misrepresented Monongahela's power of eminent domain. They contended Monongahela had the power to condemn plaintiffs' properties. On August 6, 1986, the district court granted defendants' motion, but sent the remaining claims of fraudulent misrepresentation, RICO violations, and civil conspiracy to the jury. Finding most of the defendants liable, the jury awarded $5,360,500 in compensatory damages, trebled under RICO. *See* 18 U.S.C. § 1964(c). It also awarded $5,500,000 in punitive damage because it found defendants acted outrageously.

The district court believed the jury based its compensatory award on the testimony of plaintiffs' land valuation expert, Mr. Gary Bodnar. Bodnar opined that the highest and best use as railroad rights-of-way determines market value of the properties. Because a railroad right-of-way is commercial or industrial property, Bodnar calculated the market value by comparing the properties with purchase prices of other commercial and industrial properties as well as prices eventually obtained by Closser, the Phillippis, and the Culps.

Appendix A

Defendants moved for judgment n.o.v. on all claims. On October 22, 1987, the district court granted defendants' motion for the RICO claims for it concluded plaintiffs failed to satisfy RICO's "continuity" requirement. Supp. App. at 127-28. It also set aside the compensatory damage award because the award was "obscenely excessive." *Id.* at 123. The court suggested remittitur, but when the parties disagreed on the amount of damages to remit it ordered a new damages trial. Plaintiffs moved for reconsideration of the district court's orders. On May 17, 1988, the court reinstated the RICO verdicts, vacating in part its October 22, 1987 grant of judgment n.o.v. On June 9, 1988, it decided not to submit the issue of punitive damages to a second jury.

On November 20, 1989, before the start of the second trial, defendants moved to vacate the May 17 1988 order that vacated the judgment n.o.v. of October 22, 1987 and reinstated the RICO claim. On March 1, 1990, the court granted defendants' motion to vacate the May 17, 1988 order, reinstated the October 22, 1987 grant of judgment n.o.v. on the RICO claim, and ordered retrial of the punitive damages issue.

In the second trial on damages, the jury award plaintiffs $4,262,677 in compensatory damages and $674,000 in punitive damages. The defendants moved for judgment n.o.v., new trial, and reargument. The district court denied these motions. Plaintiffs and defendants filed timely appeals, alleging errors at both trial.

We address these issues raised by plaintiffs: (1) whether plaintiffs satisfied the continuity requirement under RICO; (2) whether Upshur agents misrepresented Monongahela's

condemnation power; (3) whether the district court abused its discretion by setting aside the first damage award; (4) whether plaintiffs should be entitled to prejudgment interest and delay damages; and (5) whether the district court erred by granting judgment n.o.v. on plaintiff Dorothy Loughman's legal malpractice claim.

We address these issues raised by defendants: (1) whether sufficient evidence existed to support the first jury award of punitive damages; (2) whether the district court erred by instructing the jury that a misrepresentation is actionable regardless of materiality if the misrepresentation was made knowingly; (3) whether plaintiffs justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; and (4) whether certain comments made by the judge in the first trial deprived defendants of a fair trial.

II. RICO CLAIM

The district court granted defendants' motion for judgment n.o.v. on the federal RICO claims because plaintiffs failed to prove the continuity prong of RICO's "pattern of racketeering activity" requirement. Memorandum Opinion of March 1, 1990 at 15 (Smith, J.). *See* 18 U.S.C. § 1962(c). We will affirm.

When reviewing a judgment n.o.v. we must construe the evidence in a light most favorable to the non-movant and search the record for the minimum quantum of evidence to support the jury verdict. *Burke v. Maassen*, 904 F.2d 178, 181 (3d Cir. 1990). Here we cannot find the minimum quantum of evidence to support continuity.

We begin our analysis with the statute. RICO, the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (1984 & Supp. 1990), authorizes civil suits by "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." *Id.* § 1964(c). To prove that defendants violated section 1962, one must show "a pattern of racketeering activity." This requires commission of "at least two acts of racketeering activity." *Id.* § 1961(5). These predicate acts include violating federal mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343. Section 1961's two act requirement does not define a pattern of racketeering activity so much as it sets a minimum condition for such patterns to exist. *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229, 237 (1989). The statute does not define such a pattern.

In *H.J. Inc.*, the Supreme Court held that a pattern of racketeering activity requires the predicate acts be "related, *and* that they pose a threat of continued criminal activity." 492 U.S. at 239 (emphasis in original). Predicate acts are related when they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.*, 492 U.S. at 240. Because the district court granted judgment n.o.v. on continuity grounds we will assume relatedness and analyze continuity only. The *H.J. Inc.* Court described continuity but fell short of defining it. Continuity is a temporal concept. It is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.*, 492 U.S. at 241.

If a plaintiff alleges a RICO violation over a closed period ("closed-ended" scheme), she must prove a series of related predicates lasting a "substantial period of time." *Id.* at 242. If, however, she alleges a RICO violation before continuity is established ("open-ended" scheme), she must prove a "threat of continuity." *Id.* A threat of continuity exists when the predicate acts are a part of defendant's "regular way of doing business." *Id.* That is, defendant operates a "long-term association that exists for criminal purposes." *Id.*

Though the Court provides the basic structure to analyze continuity, continuity depends ultimately on the "specific facts of each case." *Id.* The Court openly invites lower courts to define it. *Id.* at 243 ("development of these concepts must await future cases").

In *Marshall-Silver Constr. Co. v. Mendel*, plaintiff alleged acts of mail fraud and extortion lasting seven months related to a scheme to force a single business entity bankrupt. 894 F.2d 593 (3d Cir. 1990). We held that the span of seven months showed "neither 'long-term' criminal conduct nor the threat thereof." *Id.* at 598.

In *Banks v. Wolk*, plaintiff alleged that two of the defendants, Wolk and Weiner, misrepresented facts to defraud him of his interest in a single piece of real estate. 918 F.2d 418 (3d Cir. 1990). The injury occurred within an eight month period and there was no threat of "future misconduct by Wolk or Weiner." *Id.* at 423. As to this closed-ended scheme, we held eight months was insufficient to show continuity. *See Kehr Packages, Inc. v. Fidelcor*, 926 F.2d 1406, 1418 (3d Cir. 1991) ("eight-month period of fraudulent activity directed at a single entity does not constitute a pattern,

absent a threat of future criminal acts"); *Hindes v. Castle*, 937 F.2d 868, 875 (3d Cir. 1991) (eight month period failed to satisfy continuity).

Contrasting *Marshall-Silver*, *Banks*, *Kehr*, and *Hindes*, we note that in *H.J. Inc.* the Court found that violations lasting six *years* were sufficient to show "substantial period of time" in a closed-ended scheme or, alternatively, to show regular way of doing business in an open-ended one. 492 U.S. at 250. In other circuits, only a period of years appears substantial. *See Fleet Credit Corp. v. Sion*, 893 F.2d 441, 447 (1st Cir. 1990) (over four years); *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688, 690 (4th Cir. 1989) (ten years); *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d cir. 1989) (unspecified "matter of years"); *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 887 (6th Cir. 1990) (seventeen years).

After *H.J. Inc.*, we found continuity in two cases. Both were of the open-ended kind. That is, they involved a future threat of RICO violations. In *Swistock v. Jones*, we held that because plaintiffs alleged future violations as to "other potential transactions" plaintiff sufficiently raised the issue of whether fraud was the defendant's regular way of doing business (though the predicate acts lasted only fourteen months). 884 F.2d 755 (3d Cir. 1989). And in *Banks*, we found that some of the defendants, the Cohen brothers, used fraud as a regular way of doing business. 918 F.2d at 424. Thus as to the Cohen brothers, but not Wolk or Weiner, we found continuity.

Plaintiffs identified the RICO violation as "fraudulent misrepresentations, threats and omissions . . . [that resulted in plaintiffs selling] their property well below its true value." App. at

59 (Kent's Amended Complaint, ¶ 45.) They alleged violations of federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, as the predicate acts underlying RICO violations. *See* 18 U.S.C. § 1961(1). We will examine the evidence with respect to both open- and closed-ended schemes.

As to open-ended scheme, we find no evidence that defendants used fraud as a regular way of doing business or formed an on-going criminal association. Upshur threatened plaintiffs to obtain specific parcels of property. Plaintiffs each had but one property to sell; defendants had but one area to acquire. There were no "potential" areas of interest. Once defendants obtained the property, they posed no future threat to plaintiffs or society. The defendants' fraud was not akin to the type where hoodlums sell "insurance" to storekeepers to cover them against breakage of their windows, telling their victims they would return each month to collect their "premiums". *H.J. Inc.*, 492 U.S. at 242. Theirs was akin to a one time racket to obtain a specific bounty. We find no continuity under an open-ended scheme.

As to closed-ended scheme, we find no evidence of a substantial period of time. In the first trial, Judge Teitelbaum first found no continuity and then reversed himself. In the second trial, on March 1, 1990, Judge Smith held that there was no continuity. We agree that there was no continuity.

Reviewing the record, Judge Teitelbaum made the correct factual finding: Defendants' scheme "lasted from July 1981 until sometime in early-1982." Memorandum Opinion of May 17, 1988 at 7 (Teitelbaum, J.). More precisely, Judge Smith found the scheme lasted from June 1981 to

June 1982. Memorandum Opinion of March 1, 1990 at 13 (Smith, J.). In fact plaintiffs testified that contacts with Upshur agents – the source of these actions – started about September 1981 and ended in June 1982, a ten month period. *Loughman v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1114, 1120 (W.D. Pa. 1990).

All the evidence points to a short term operation. The Property Acquisition Agreement between Consol and Monongahela shows they anticipated needing Upshur for only 120 days. When all the property in the "Areas of Interest" were acquired, Upshur was to be discharged. The agreement shows no intent to acquire more land than originally contemplated. It specifically links the existing spur to all mines in the area and does not mention the need for more construction of spurs or taking of private property. When the defendants acquired all the property in the areas of interest, the fraud was complete. In short, defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most.

Because "duration is the *sine qua non* of continuity" in a closed-ended scheme, the issue then is whether twelve months is a substantial period of time. *Hindes*, 937 F.2d at 873. In *Hindes* we hinted that one year is not a substantial period of time. *Id.* at 875 ("we will not hold that although eight months is not enough [to be a substantial period of time], a year is"). We hold that twelve months is not a substantial period of time.

We note that cases finding substantial period, including *H.J. Inc.*, dealt with fraudulent conduct lasting *years*, sometimes over a decade. Such findings of substantial time periods are consistent

with Congress' intent to combat "long-term criminal conduct." *H.J. Inc.*, 492 U.S. at 242. Recently, we noted that "[a]lthough RICO has not been limited to organized crime activity, we must not overlook that it was occasioned by Congress' perception of the danger posed by organized crime-type offenses, which are almost by definition continuing." *Hindes*, 937 F.2d at 874.

The time period of this case belongs with those of *Marshall-Silver* (seven months), *Banks* (eight months), *Kehr* (eight months), and *Hindes* (eight months). We therefore find no continuity under a closed-ended scheme. In *Hindes* we declined to set forth a "litmus test" to measure duration. *Id.* at 875. We still decline. We conclude only that there is no qualitative difference between eight and twelve months for the purposes of RICO continuity.

III. FRAUD UNDER PENNSYLVANIA LAW

A.

MONONGAHELA'S CONDEMNATION POWERS

Plaintiffs claimed that when seeking to acquire the railroad rights-of-way defendants fraudulently misrepresented, among other things, that Monongahela had power to condemn private property. The district court found this representation to be true, holding that as a matter of law Monongahela had eminent domain powers. It granted partial summary judgment for defendants as to that representation, but sent other alleged misrepresentations to the jury. Plaintiffs appeal this grant of partial summary judgment. We have plenary review and will affirm.

Plaintiffs asserts that Monongahela did not have eminent domain power for three reasons: (1)

because it lacked the Interstate Commerce Commission's (ICC) approval to construct the new track; (2) because there was no public use to justify condemnation; and (3) because the track was outside Monongahela's chartered area.

First, we disagree with plaintiffs as to their first reason. To begin, we note that ICC approval is required when a rail carrier seeks to construct, operate or acquire an additional line or extension. 49 U.S.C. § 10901(1). It, however, is *not* required when a rail carrier seeks to construct, operate, or acquire an intra-state *spur*. 49 U.S.C. § 10907(b)(1). Whether a track is a "spur" or "extension" is a mixed question of law and fact. *United States v. Idaho*, 298 U.S. 105, 109 (1936).

If the proposed track is designed to transport goods between different points of shipment or to invade the territory occupied by another railroad, that track is an extension. *See Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266, 278 (1926); *Nicholson v. ICC*, 711 F.2d 364, 368 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). If, however, the track is "designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for [transporting goods between two different points of shipment]," that tract is a spur and lies outside ICC jurisdiction. *Nicholson*, 711 F.2d at 367-368. Among other factors to be considered in determining whether it is a spur are the length of the addition; whether the proposed addition will serve only a single customer; and whether the carrier had been requested by the customer to provide service. *See Pennsylvania R.R. Co. v. Reading Co.*, 132 F. Supp. 616, 621-22 (E.D. Pa. 1958).

Appendix A

The district court correctly found that the proposed track was a spur. Though a track's designation itself does not determine its character (extension or spur), the track in question is sufficiently local to preclude ICC jurisdiction. *Nicholson*, 711 F.2d at 368, n.12. The track runs from the Bailey Mine in Grand Enon, Pennsylvania, to Waynesburg. It runs only 14.5 miles.[1] It is located wholly intra-state. It functions as a route to unload and transfer shipments from the Waynesburg line. It does not invade the territory of another railroad. Only Monongahela uses it. And it serves only Consol. In short, none of its features evokes "national concern." *Texas & Pacific*, 270 U.S. at 277. The district court was correct; ICC approval was unnecessary.

Second, we disagree with plaintiffs as to the second reason. Plaintiffs contend that Monongahela can only condemn for "public use." *See* U.S. Const. amends. V; Pa. Const., art. I, § 10; *Id.*, art. X, § 4. The proposed use, they contend, is private.

When determining what constitutes "public use," the Supreme Court defers to legislative decisions. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1983) (Court will defer to legislative decision regarding public use unless that decision is unreasonable). That property is taken by eminent

1. The landowners cite *Central of Georgia Railway*, 336 I.C.C. 623 (1970) for the proposition that a 14.5 mile track could not be a spur. In *Central of Georgia Railway*, the ICC concluded that a 14.45 mile track costing more than $3 million was an extension. The decision was based on the length of the track and the cost alone. We refuse to adopt this reasoning since, a track's designation depends on its use, not the length and cost alone.

domain and is transferred to a private party can still fall within the gambit of public use. This is so even when the motive for taking is to give to a private party. *Id.*, 467 U.S. at 243-44. Thus, under the United States Constitution "public use" is a broad concept.

Pennsylvania law is much the same. A condemning authority may only take for public use. The legislature may not grant the condemnor the right to take private property for private use. *See Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 309-310, 88 A. 481, 482 (1913); *Borough of Big Run v. Shaw*, 16 Pa. Commw. 623, 626, 330 A.2d 315, 317 (1975). Notwithstanding, a taking retains its public character even when a portion of it benefits a private party. *In re Franklin Town Project-Philadelphia*, 19 Pa. Commw. 272, 280-81, 339 A.2d 885, 889, *cert. denied*, 423 U.S. 992 (1975). *See Dornan v. Philadelphia Hous. Auth.*, 331 Pa. 209, 200 A. 834 (1938).

In *Pioneer Coal Co. v. Cherrytree & Dixonville R.R.*, the Pennsylvania Supreme Court reasoned that public use should be broadly defined when the use benefits the Commonwealth. 272 Pa. 43, 116 A. 45 (1922). When defendant railroad condemned property to extend its track to reach a coal mine, the Court found public use because "the life, happiness and prosperity of the people of Pennsylvania depend to a very large degree upon getting the coal supply of the state out of the mines, on its way to the consumer." *Id.*, 272 Pa. at 52, 116 A. at 48. *See Philadelphia, Wilmington & Baltimore R.R. v. Williams*, 54 Pa. 103 (1867) (prosperity of city depended on transporting coal by rail).

Here, the district court found public use. We agree. The district court noted: "[Manor Reserve,] once at full production, will produce 3,000,000 tons of coal per year and will employ 350 people. The coal extracted from the mine has an average sulfur content of 1.7%, a low and desirable level that complies with emission standards generally applicable in the United States and Europe." Supp. App. at 115-116. The Manor Reserve mine and the track running to it benefit the Commonwealth's coal mining industry and the public. That the mine serves a private coal company does not diminish the public value. Constructing a spur will tap vital coal resource, provide fuel for the Commonwealth, create jobs, and better the environment.

Last, we disagree with plaintiffs as to their third reason. They contend that because the Manor track runs outside Monongahela's charter area Monongahela lacked the power to condemn property outside of its franchise without first obtaining a certificate from the Commonwealth's Public Utility Commission (PUC). *See* 66 Pa. Cons. Stat. Ann. § 1104.

We need not consider this contention in light of what happened at trial. Judge Teitelbaum instructed the jury that "[y]ou will reach the issue of damages only if you find that the plaintiffs have established all of the elements of *any* of their claims." Supp. App. 218. This instruction reflects the correct assumption that since plaintiffs had but one property each they could have suffered as a result of the misrepresentations only once, regardless of the number of misrepresentations committed. The jury found that fraud was committed and awarded damages to plaintiffs.

Thus even if this additional misrepresentation was made, it is irrelevant.

In sum, the district court properly granted partial summary judgment on plaintiffs' claim that Upshur agents misrepresented Monongahela's condemnation powers.

B.

JURY INSTRUCTIONS ON FRAUDULENT MISREPRESENTATION

The district court instructed the jury, "[i]f it is shown that a misrepresentation was made knowingly, then the misrepresentation need not be material." Supp. App. at 216. Defendants argue that when the district court gave this instruction it erred as a matter of law. We disagree and will affirm. Our review of this legal issue is plenary.

Under Pennsylvania law a fraud claim requires plaintiff to prove either a knowing misrepresentation or nonprivileged failure to disclose some existing fact. If, however, "the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved." *Smith v. Renault*, 387 Pa. Super. 299, 305-06, 564 A.2d 188, 192 (1989) (quoting *Shane v. Hoffman*, 227 Pa. Super. 176, 181-82, 324 A.2d 532, 536 (1974)), *overruled on other grounds*, *Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 560-61, 499 A.2d 282, 286 (1985). Thus, materiality becomes important only when the misrepresentation was innocently made or when it involved a privileged failure to disclose. The district court's instructions adequately reflected this distinction.

Even if we held all the misrepresentations were innocently made and materiality became a concern, the "error" is harmless. Upshur's misrepresentations were most material. The gross disparity between the prices obtained by the plaintiffs and those who knew of Consol's role (Closser, the Phillippis, and the Culps) bespeaks materiality. Moreover, while defendants correctly point out that Upshur had no duty to disclose Consol's role, they neglect to mention that Upshur agents affirmatively misrepresented that Monongahela was the *sole* principal. *See Chiarella v. United States*, 445 U.S. 222, 227-228 (1980). This representation constituted more than "mere silence"; it constituted active concealment. It amounted to common law fraud. *Renaut*, 387 Pa. Super. at 306, 564 A.2d at 192.

C.

JUSTIFIABLE RELIANCE ON TAX REPRESENTATIONS

The defendants moved for judgment n.o.v. as to the liability based on the representation of the tax free nature of the transactions. They claim there was insufficient evidence for the jury to conclude that plaintiffs justifiably relied on defendants' representation. Because they are not tax experts, defendants argue, plaintiffs should have independently investigated the tax matter. The district court denied the motion. We will affirm.

The same standard of review applies to this denial of a judgment n.o.v. as it did for the denial of the RICO judgment n.o.v., *supra*. *See Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988).

Appendix A

Justifiable reliance on a misrepresentation is an element of common law fraud. *Klemow v. Time, Inc.*, 466 Pa. 189, 197 n.17, 352 A.2d 12, 16 n.17, *cert. denied*, 429 U.S. 828 (1976). Moreover, "[w]here the means of obtaining information are not equal the positive representations of the person who is supposed to possess superior means of information may be relied on." *Siskin v. Cohen*, 363 Pa. 580, 70 A.2d 293 (1950) (quotation omitted).

The Upshur agent *approached* plaintiff landowners, told them that he represented Monongahela, denied involvement of Consol, offered a purchase price, threaten plaintiffs that they would receive a lower fixed condemnation price if they refused to accept the agent's offer, and stated that part of the purchase price paid would be tax free. Upshur agents possessed superior access to information, initiated the sales of property, and presented themselves as land experts. Under these circumstances, the negotiating parties did not stand on equal footing and plaintiffs justifiably relied on the Upshur agent's statements concerning the tax consequences of a sale without making an independent investigation.

Justifiable reliance is even more evident in the cases where defendants' attorneys told plaintiffs of the tax free consequences of the sale. A lay person may justifiably rely on a lawyer's statement of fact or opinion of law though he knows the lawyer is representing a client whose interest is adverse to his own. Restatement (Second) of Torts, § 545, comment d.

Appendix A

IV. DAMAGES

A.

COMPENSATORY DAMAGE AWARD

Plaintiffs contend that the district court erred by granting a new damages trial. We agree and will reverse. We review for an abuse of discretion. *Semper v. Santos*, 845 F.2d 1233, 1236 (3d Cir. 1988).

Under Pennsylvania law, the measure of damages for a fraud claim is the actual loss that the fraud inflicts. *Savitz v. Weinstein*, 395 Pa. 173, 178 & n.2, 149 A.2d 110, 113 & n.2 (1959); *Peters v. Stroudsburg Trust Co.*, 348 Pa. 451, 35 A.2d 341, 343 (1944); *Delahanty v. First Pa. Bank, N.A.*, 318 Pa. Super. 90, 117-18, 464 A.2d 1243, 1257 (1983). Actual loss equals the fair market value of the property when sold minus the fraudulently paid price. *Stroudsburg Trust*, 348 Pa. at 454, 35 A.2d at 343; *Bishoff v. Valley Dairy Co.*, 302 Pa. 125, 153 A. 133 (1931).[2] The issue is whether the actual loss should be based on the properties' use as agricultural lands or the highest and best use as railroad rights-of-way.

At trial, plaintiffs' expert, Bodnar, testified that he valued the properties by assuming the highest and best use parameter: that is, value as a railroad right-of-way. To determine this value, he considered the selling prices of the Closser, Culp, and Phillippi parcels.

---

2. The defendants claim that the landowners are only entitled to out-of-pocket losses rather than the benefit of the bargain. The cases cited, however, concern fraudulent misrepresentations *by* a seller *to* a purchaser. Here, we are faced with the converse situation.

Appendix A

The district court rejected Bodnar's testimony. Because it believed that the jury relied on Bodnar's testimony to compute the damages, the court rejected the jury award. It characterized Closser, the Culps, and Phillippis as "hold-outs." Since prices paid to hold-outs far exceed true market value, the court reasoned that Bodnar's valuations do not reflect the fair market value.

Under Pennsylvania law, a property owner can show her property's special and potential use as a railroad right-of-way when she faces condemnation. *See North Shore R.R. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990 (1916); *Commonwealth Dep't of General Servs. v. Fake*, 45 Pa. Commw. 46, 405 A.2d 971 (1979). To prove highest and best use, a condemnee must show the land is adaptable to such use and a market need existed for such use at the time of the condemnation. *Fake*, 45 Pa. Commw. at 50-51, 405 A.2d at 974. *See United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15 (10th Cir. 1975).

Contrary to the district court's conclusions, Bodnar properly referred to the prices paid to the "hold-outs." A railroad right-of-way existed across many of the plaintiffs' properties long before Upshur agents approached them. The year before the Upshur agents offered to buy the property, Consol approached some plaintiffs to see if they were interested in selling. Thus plaintiffs' properties were adaptable for use as railroad rights-of-way and Bodnar properly calculated this potential into the value.

As to fair market value, the prices paid to the hold-outs reflect the market value. Consol needed each and every piece of property to construct their track. Though the district court correctly

characterized Closser, Culp and Phillippi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillippi knew – that Consol was involved and that Monongahela could not have condemned their properties for fixed prices. But for the defendants' scheme misrepresenting the circumstances surrounding Monongahela's property acquisitions, plaintiffs would have commanded higher prices. And these prices more accurately reflect fair market value. The district court abused its discretion by discounting Bodnar's testimony and setting aside the first damage award.

B.

PUNITIVE DAMAGE AWARD

The defendants contend that there was insufficient evidence to support the jury' award of punitive damages against some of the defendants. We disagree and will affirm.

"Fraud, alone, is not sufficient" to justify an award of punitive damages. *Golomb v. Korus*, 261 Pa. Super. 344, 348, 396 A.2d 430, 432 (1978). The conduct must be outrageous for a jury to award punitive damages. *Rizzo v. Haines*, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989); *Pittsburgh Outdoor Adv. Co. v. Virginia Manor Apts., Inc.*, 436 Pa. 350, 353, 260 A.2d 801, 803 (1970). Where the defendants are agent and principal, the agent's conduct must be "clearly outrageous to justify the vicarious imposition of exemplary damages upon the principal." *Delahanty*, 318 Pa. Super. at 132, 464 A.2d at 1264 (quoting *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 851-52 (3d Cir.

1964)). Plaintiffs must show outrageous conduct by a preponderance of the evidence. *See Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1098 (1985).

Plaintiffs clearly showed outrageous conduct. Upshur agent Boggs told the Hughes that they would have to be out of their house within two months though they had no interest in selling their property. He told the Headlees: "[Y]ou forget Consol. You are dealing with Mon railway system now." App. at 116A. When the Headlees expressed concern about the proximity of the track to their house and children, Boggs stated that if the right-of-way were condemned, the railroad could place the tracks within 10 feet of their home and is under no duty to fence the track or to otherwise provide for the safety of the Headlees' children. We hold that the jury could reasonably conclude that defendants acted outrageously when they obtained property by fraud, economic coercion, and thinly-veiled personal threats.

C.

DELAY DAMAGES AND PREJUDGMENT INTEREST

The district court awarded delay damages under Pa. R. Civ. P. 238. We have plenary review and will reverse. Rule 238 allows for interest on compensation awards arising from "bodily injury, death or property damage." Because this case involves lost profits the district court erred by allowing them.

As for prejudgment interest, the district court refused to award it. We agree and will affirm. When deciding whether to award prejudgment

interest to a party, a court must consider "whether countervailing equitable considerations militate against such a surcharge." *See American Mut. Liab. Ins. Co. v. Kosan*, 635 F. Supp. 341, 346 (W.D. Pa. 1986), *aff'd*, 817 F.2d 751 (3d Cir. 1987).

In *Arkla Exploration Co. v. Boren*, the court of appeals refused to award prejudgment interest where the plaintiff did not preserve the issue under Fed. R. Civ. P. 51 at the time the district court instructed the jury on the amount of damages to be entered should they choose to return a liability verdict. 411 F.2d 879, 883-884 (8th Cir. 1969).

Likewise plaintiffs failed to preserve the issue here. Plaintiffs first moved for prejudgment interest in June 1990, seven years after filing this action in federal court. This was too late. Plaintiffs explain this delay by noting that the district court awarded them delay damages under Pa. R. Civ. P. 238. Since *American Enka Co. v. Wicaco Mach. Corp.* prevents a party from obtaining *both* delay damages and prejudgment interest, plaintiffs argue that they were forced to rely on the court's award of delay damages and could not request prejudgment interest. 686 F.2d 1050, 1057 (3d Cir. 1982). This decision was imprudent. Plaintiffs should have moved for both remedies at the outset and let the court decide which to grant. We hold that plaintiffs' untimely request for prejudgment interest constitutes a countervailing equitable consideration militating against such a surcharge.

V. LEGAL MALPRACTICE

Plaintiff Dorothy Loughman claims that the district court erred when it granted Attorney Ewing

Pollock judgment n.o.v. on her legal malpractice action. We agree and will reverse.

To establish legal malpractice under Pennsylvania law, plaintiffs must show three elements: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) the attorney's negligence proximately caused damage to the client. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65 (quoting *Schenkel v. Monhelt*, 266 Pa. Super. 396, 405 A.2d 493, 494 (1977)). Viewing the evidence in a light most favorable to Loughman, we conclude that the evidence was sufficient to support a finding of legal malpractice.

Loughman owned 50.79 acres of land in the area of interest. An Upshur agent approached her and claimed that he represented Monongahela. He offered to purchase her property for $60,000. Loughman rejected the offer. The agent threatened that Monongahela would use its condemnation authority to take a 13 acre right-of-way for $1000 per acre. If Monongahela condemned the 13 acres, most of Loughman's property would be rendered inaccessible.

The same day Loughman telephoned her attorney Pollock. She had known Pollock for about forty-two years, and he had handled legal matters for her and her family. At that time Pollock was working for Monongahela, unbeknownst to Loughman. Loughman explained the situation, and Pollock told her not to worry because Monongahela would be fair. He also told her she did not need an attorney to negotiate with the Upshur agent.

Under these circumstances, we conclude sufficient evidence exists to find an attorney-client

relationship, lack of ordinary care, and proximate cause. When Loughman called Pollock, an attorney-client relationship was formed. She called him to seek his legal advice. He accepted this offer and readily gave advice. That Pollock previously represented her only furthers this conclusion. When Pollock told her that Monongahela would be fair without knowing what price had been offered, and when he failed to tell her Consol was involved and he represented Consol, Pollock failed to exercise ordinary skill and knowledge. Since Loughman testified that she agreed to sell only after she had consulted with Pollock, his advice and representations proximately caused her lost profits. Therefore the district court erred by failing to uphold the jury verdict on malpractice.[3]

VI. DISTRICT COURT'S REMARKS

Upshur agents contend the district court deprived them of a fair trial by calling them liars. Specifically, they complain about the district court's remarks that they "lied" if they represented

---

3. The defendant attorneys argue that there is no evidence that Pollock fraudulently misrepresented Monongahela's condemnation powers to Dorothy Loughman, made any misrepresentations concerning the role of Consol or any other defendant in the transaction, or told her that a portion of the purchase price would be tax free.

Notwithstanding these arguments, the requisite minimum quantum of evidence supports the jury verdict against Attorney Pollock. Pollock told Loughman that Monongahela would treat her fairly without knowing the offered price for her parcel. Furthermore, he failed to disclose his representation of the defendants although he had a duty to do so. This evidence adequately supports a jury finding that Pollock committed fraud in his dealings with Loughman.

that property could be condemned for a fixed price. We disagree and will affirm.

In *American Home Assur. v. Sunshine Supermarket*, we stated:

> A federal judge is permitted to summarize and comment upon the evidence . . . . The court's comments, however, may not confuse or mislead the jury, or become so one-sided as to assume an advocate's position.

753 F.2d 321, 327 (3d Cir. 1985). Here, the district court merely characterized the great weight of the testimony and drew a correct conclusion. If the district court's comments confused or misled the jury, we still find no prejudicial error for the judge cured any error. He instructed the jury that only its decision counts and that it does not "have to be influenced" by anything he thinks or says.

VII. CONCLUSION

We conclude that the district court erred by setting aside the first damage award; the first award of punitive damages was adequately supported by the record; plaintiff landowners are not entitled to either prejudgment interest or delay damages; the district court properly granted judgment n.o.v. on the RICO claim since the continuity requirement was not satisfied; the Upshur agents' representation of Monongahela's condemnation power was a true statement; the district court properly instructed the jury as to the law of misrepresentation; the plaintiffs could have justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; the district court erred by granting judgment n.o.v. on landowner Loughman's legal

malpractice claim; and the district court's remark did not deprive defendants of a fair trial. We will vacate the second damage award and reinstate the first award returned by the jury.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3466

JAMES E. HUGHES and LINDA L. HUGHES,

Appellant

v.

CONSOL-PENNSYLVANIA COAL COMPANY, et al.

[OTHER CAPTIONS OMITTED]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action Nos. 83-00921, 83-01674, 83-01675, 83-01676, 83-01677, 83-01678, 83-01679, 83-01754)

Present: Sloviter, *Chief Judge*, Nygarrd, *Circuit Judge*, and Katz, *District Judge**.

AMENDED JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel January 28, 1991.

---

* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

On consideration whereoof, this Court hereby holds that the said District Court erred by setting aside the first damage award; the first award of punitive damages was adequately supported by the record; plaintiff landowners are not entitled to either prejudgment interest or delay damages; the district court properly granted judgment n.o.v. on the RICO claim since the continuity requirement was not satisfied; the Upshur agents' representation of Monongahela's condemnation power was a true statement; the district court properly instructed the jury as to the law of misrepresentation; the plaintiffs could have justifiably relied on the Upshur agents' statements concerning the tax free nature of the property transactions; the district erred by granting judgment n.o.v. on landlowner Loughman's legal malpractice claim; and the district court's remark did not deprive defendants of a fair trial. Accordingly, it is now here ordered and adjudged that the judgments of the said District Court appealed here are vacated as to the second damage award and the causes are remanded to the said District Court with instruction to reinstate the first awards returned by the jury. All of the above is accordance with the opinion of this Court.

ATTEST:

CLERK

Dated: December 20, 1991

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JUNE 18, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 83-921,
83-1674, 83-1675, 83-1676,
83-1677, 83-1678, 83-1679 &
83-1754

DOROTHY LOUGHMAN, et al.,

Plaintiffs,

vs.

CONSOL-PENNSYLVANIA COAL CO., et al.,

Defendants.

MEMORANDUM ORDER

This court conducted a new trial in these consolidated cases, on damages only, in March, 1990. The parties have filed various post-trial motions, which we address here *seriatim*. As a preliminary matter, however, plaintiffs have moved to strike defendants' post-trial motions as exceeding the scope of the retrial or for having been waived by defendants. We have addressed only motions relevant to the second trial. In that regard, we find that defendants adequately have preserved these points at trial, with one exception noted below. The motion to strike is denied.

Appendix B

I. *Defendants' Motions For JNOV and New Trial*

Defendants Consol Pennsylvania Coal Company, Consolidation Coal Company, Consol Land Development Company, The Monongahela Railway Company, Rheinbraun U.S. Corporation, Rheinische Braunkohlenwerke A.G., and Marie Theresa Bergbaugesellschaft MHB (the "Coal Company defendants") move for a judgment notwithstanding the verdict on grounds that plaintiffs introduced insufficient evidence at trial to support a finding of any damages, compensatory or punitive. The standard for evaluating a judgment notwithstanding the verdict is whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987) *cert. denied*, 109 S.Ct. 782 (1989). Where the evidence is contradictory, a judgment notwithstanding the verdict is inappropriate. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).[1]

---

1. The Third Circuit has explained the JNOV standard as follows:

> [S]ince the credibility of witnesses is peculiarly for the jury, it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriaga of justice. If convinced that there has been, than it is his duty to set the verdict aside; otherwise not.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960).

Appendix B

In these cases, plaintiffs presented expert testimony concerning the fair market value of their properties which would support the jury's verdict. Therefore, we deny the motion for JNOV.

The Coal Company defendants also seek a new trial on several grounds. First, defendants claim that the amount of damages set by the jury is so excessive as to warrant a remittitur or, in the alternative, a new trial. An order directing plaintiffs to remit a portion of the verdict in excess of the maximum amount supportable by the evidence or, if remittitur is refused, to submit to a new trial is the proper procedure in situations where no clear judicial error or "pernicious influence" can be identified but where the verdict is so large as to shock the conscience of the court. *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983). In light of the evidence presented at trial, we cannot say the size of the verdict here is shocking.

Next, defendants allege that certain evidentiary errors by this court necessitate a new trial. In particular, defendants attack the court's decision to admit into evidence the testimony of plaintiffs' real estate experts and the testimony of David Book, an attorney Involved in negotiations with defendants on behalf of some other property sellers, not plaintiffs. We already have addressed the admissibility of plaintiffs' experts' testimony by denying defendants' motions in limine. See *Loughman v. Consol. Pa. Coal Co., et al*, No. 83-921, slip op. at 7-9 (W.D. Pa. January 31, 1990). We reiterate only that the Federal Rules of Evidence establish a liberal policy of permitting expert testimony. In that defendants did not challenge the qualifications of plaintiffs' experts and had ample opportunity to introduce their own experts on the issue of fair market value, we see no error in our decision to admit the testimony of plaintiffs' experts.

Likewise, we see no error in allowing David Hook to testify about certain conduct of defendants which was consistent with or similar to the conduct of defendants vis-a-vis the plaintiffs in this case, such information being relevant to plaintiffs' fraud claims. Testimony by Mr. Hook outside the scope of similar or consistent conduct was merely cumulative in nature and created no prejudice to defendants.

Defendants allege that plaintiffs' counsel's closing argument was so inflammatory as to support the need for a new trial. In that regard, defendants allege that counsel made references to evidence not of record, that he made inappropriate references to some of defendants' nationalities, and that he improperly argued the finding of liability by the previous jury. After plaintiffs' counsel's closing and upon objections of defendants, this court delivered a curative instruction to the jury.

A new trial may be ordered where counsel engages in improper conduct having a prejudicial effect on the jury. Whether there is prejudice depends on whether there is a reasonable probability that the jury's verdict was influenced by the conduct in question. *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465, 471 (E.D. Pa. 1988), *aff'd in relevant part, remanded on other ground*, 868 F.2d 1342 (3d Cir. 1989). In light of the curative instruction delivered to the jury, we find no reasonable probability that the jury was influenced improperly by counsel's comments.

Defendants have challenged the sufficiency of the jury charge, complaining that it lacked an appropriate instruction concerning nominal damages and vicarious liability and alleging that it was generally confusing to the jury. As for the lack of an instruction on nominal damages, there was never a request concerning such a charge and therefore we find any objection now to its absence to be untimely. Concerning the jury instruction on agency and

vicarious liability, the court inclluded sufficiently clear instructions on these legal issues and we find defendants suffered no prejudice on this point. Finally, we detected no confucion generally on the jury's part, nor did counsel complain that the charge was potentially confusing, even though counsel were presented with a copy of the charge well before it was delivered orally to the jury.

Finally, defendants have raised two due process arguments in support of their new trial motion. First, they complain that with regard to the claims for punitive damages the retrial improperly bifurcated the liability and amount of damages issues. At the first trial, the jury found by special interrogatory that defendants' conduct was outrageous, and that defendants were liable for punitives. Because a RICO claim remained in the case at that time, Judge Teitelbaum's order vacating the damage amounts did not expressly address punitivies, the Couut having determined that the treble damage provision of RICO preclulded the punitives. At the time of retrial, the RICO claims having been dismissed by our Order of March 1, 1990, we determined that Judge Teitelbaum's Order directing that the first jury's calculation of damages was excessive required a retrial of all damages issues. We see no error in retrying the amount of punitives again, and in particular, we find that no prejudice to defendants resulted since the collective sum of punitives assessed at the second trial represented more than a four million dollar reduction from the amount assessed at the first trial.

Defendants' second due process argument is that Pennsylvania law provides insufficient guidance to juries in calculating punitive damage awards. We do not recollect defendants previously raising this objection, either in formal motions or in the conferences concerning the jury instructions. Although defendants have not expounded on the legal basis for this argument in the form of

a memorandum or in the motion itself, we presume that defendants are in effect challanging the Pennsylvania Supreme Court's recent holding that the amount of punitive damages need not bear a reasonable relationship to compensatory damages award ed in a particular case. *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989). *Kirkbride* may have eliminated one standard for evaluating punitive damages; however, we find that juries in Pennsylvania still have sufficient guidelines by which to calculate the amount of punitive damages to be assessed, if any. The relevant factors, set forth in the Restatement of Torts (Second), have been adopted by the Pennsylvania courts and were included in this court's jury instructions in the instant cases:

> In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts § 908(2) (1979). Accord *Kirkbride*, 521 Pa. at 100, 555 A.2d at 802; *Chuy v. Phil. Eagles Football Club*, 595 F.2d 1265, 1277 (3d Cir. 1979). Where the amount of punitive damages is so disproportionate in light of these factors that it shocks the court's sense of justice, the court may, in its discretion, remit the damages to a more reasonable amount. *Kirkbride*, 521 Pa. at 104, 555 A.2d at 803-04.

In light of the circumstances in the trial of these cases, we find that defendants' due process rights were adequately protected.

For the foregoing reasons, the post-trial motions filed by the Coal Company defendants are denied.

Appendix B

Defendants Ewing Pollock, Pollock Pollock & Thomas, the Upshur Agency, Inc., David Boggs, Mike Wilson and William Reese have also filed post-trial motions for judgment notwithstanding the verdict and for a new trial. These motions present us with nothing substantially different from the arguments made by the coal company defendants; therefore, we also will deny the other defendants' motions for JNOV and for a new trial.

II. *Plaintiffs' Motion to Impose Prejudgment Interest and To Impose Delay Damages.*

Plaintiffs seek delay damages under Rule 238 of the Pennsylvania Rules of Civil Procedure. Contrary to Plaintiffs' interpretation of the record, this Court has not ruled on this issue previously. In addressing the post-trial motions from the first trial, Judge Teitelbaum held that delay damages were appropriate. *Loughman v. Consol Pa. Coal Co. et al.*, No. 83-921 slip op. at 4 (W.D. Pa. October 22, 1987). Our analysis of the case law leads us to the opposite conclusion and we will deny plaintiffs' motion for delay damages.

Rule 238 provides for mandatory interest on compensatory damage awards arising from bodily injury, death or property damage, which interest is to be calculated from the date of the complaint. Plaintiffs' damages do not arise from bodily injury, death or property damage. These cases do not present the kind of damage to tangible property anticipated by Rule 238. They arise from fraud in the making of contracts. We find them to be tort cases and similar to an action for tortious interference with a contract in that they allege lost profits from the sale of Property. Rule 238 does not apply to cases involving lost profits or income. *Butler v. Flo-Ron Vending Co.*, 383 Pa. Super. 633, 655, 557 A.2d 730, 741 (1989), *allocatur denied*, ____ Pa. ____,

567 A.2d 650 (1989); *Temporaries Inc. v. Krane*, 325 Pa. Super. 103, 115, 472 A.2d 668, 674 (1984); *Contractor Utility Sales Cos. v. Certain-Teed Corp.*, 748 F.2d 1151, 1157 (7th Cir. 1984) (applying Pennsylvania law) (Dumbauld, J.), *cert. denied*, 470 U.S. 1029 (1985). Plaintiffs' motion for delay damages is denied.

B. *Prejudgment Interest*

Plaintiffs also seek common law Prejudgment interest.

> Common law pre-judgment interest is based on the principle of compensetion and the understanding that a plaintiff wrongfully deprived of a sum of money is not made whole unless the delay in recovery is accounted for.
>
> * * *
>
> . . . in Pennsylvania common law damages for delay are recoverable in tort actions when the amount is liquidated or capable of mathematical ascertainment.

American Enka Co. v. Wicaco Mach. Corp., 686 F.2d at 1056, 1057. Prejudgment interest could be appropriate in these cases because the amount of plaintiffs' damage was ascertainable by reference to the fair market value of the properties sold.

The decision to award damages in delay and the rate of interest is in the discretion of the trial court. *Sack v. Feinman*, 495 Pa. 100, 432 A.2d 971 (1981); *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 981 (3d Cir. 1984). Accord *Levy v. First Pennsylvania Bank, N.A.*, 338 Pa. Super. 73, 84,

487 A.2d 857, 863 (1985).[2] There are four factors to consider when contemplating an award of prejudgment interest:

> 1) whether the claimant has been less than diligent in prosecuting the action;
>
> 2) whether the defendant has been unjustly enriched;
>
> 3) whether an award would be compensatory; and
>
> 4) whether countervailing equitable considerations militate against such a surcharge.

American Mut. Liability Ins. Co. v. Kosan, 635 F. Supp. 341, 346 (W.D. Pa. 1986) (Weber, J.), *aff'd w/o op.*, 817 F.2d 751 (3d Cir. 1987); *Pension Benefit Guaranty Corp. v. Greene*, 570 F. Supp. 1483, 1503 (W.D. Pa. 1983), *aff'd w/o op.*, 727 F.2d 1100 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984).

Plaintiffs have been diligent in pressing their claims, having filed them within a year of the last land transaction in question. Given both juries' determinations concerning liability and damages, the second and third factors favor a grant of prejudgment interest.

With respect to the fourth factor, defendants have raised the issue of waiver by contending that Plaintiffs did not seek common law prejudgment interest prior to the post-trial motion stage of

---

2. Contrary to defendants' position that only the jury can grant prejudgment interest, we are satisfied that the trial court may mold the verdict to include it. *Verner v. Shaffer*, 347 Pa. Super. 206, 211, 500 A.2d 479, 482 (1985).

this litigation. Our review of the record indicates that plaintiffs did not seek common law prejudgment interest in their complaints (including original and amended complaints), in their pretrial calculations of damages or even in their post-trial motions filed after the first trial in 1985.[3]

Having failed to preserve this issue during seven years of litigation, we find that plaintiffs' request for prejudgment interest at this juncture is untimely. *Arkla Exploration Co. v. Boren*1, 411 F.2d 879, 883-84 (8th Cir. 1969) (no entitlement to prejudgment interest where plaintiff did not preserve issue). The equities clearly militate against granting interest, and plaintiffs' motion for common law prejudgment interest is denied.

For the foregoing reasons, all post-trial motions filed by defendants and plaintiffs are denied.

BY THE COURT,

s/D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

---

3. Plaintiffs sought Rule 238 delay damages after the first trial, which request was originally denied but then was granted upon reconsideration.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED MARCH 1, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 83-921,
83-1674, 83-1675, 83-1676,
83-1677, 83-1678, 83-1679 &
83-1754

MEMORANDUM

SMITH, District J.

Defendants request reconsideration of their motions to grant judgment notwithstanding the verdict, originally submitted after these cases were tried to verdict in January and February, 1987. Pursuant to our order of January 31, 1990, the parties have provided us with supplemental briefs discussing the relevance of the evidence admitted at the original trial before Judge Teitelbaum in light of the United States Supreme Court's holding in *H.J. Inc. v. Northwestern Sell Telephone Co.*, 109 S.Ct. 2893 (1989). Due to the unusual circumstances in which we find ourselves in this matter, *i.e.*, ruling on a motion for judgment notwithstanding the verdict in a matter over which we did not preside originally, we requested submissions by all parties outlining and highlighting the evidence of RICO violations. Because our review of the evidence presented at the original trial reveals that plaintiffs presented evidence of land acquisition activity lasting, at the longest, approximately one year, we will grant the defendants' motion for judgment notwithstanding the verdict on the grounds that such a showing does not meet the Supreme Court's standard for establishing a pattern of racketeering as set forth in *H.J. Inc.*

Appendix C

The standard for granting a motion for judgment N.O.V is the same as that for a directed verdict. *Neville Chemical Co. v. United Carbide Corp., 422 F.2d 12205, 1210 n. 5 (3d Cir.), cert. denied,* 400 U.S. 826 (1970). See also *Wright v. Miller*, 9 Federal Practice & Procedure, § 2537. "The jury's verdict will be set aside only if manifest injustice will result if such verdict is allowed to stand. To grant such a motion the Court must find as a matter of law that there can be but one reasonable conclusion as to proper judgment." *Whitmore v. Bobst Group, Inc.*, 668 F.Supp. 421, 424 (E.D. Pa.1987) (citing *Woodward & Dickerson, Inc. v. Yoo Hoo Beverage Co.*, 502 F.Supp. 395, 397 (E.D. Pa.1980), *aff'd mem.*, 661 F.2d 916 (3d Cir.1981)). We must view the evidence and all inferences thereupon in a light most favorable to plaintiff. *In re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115, 123 (3d Cir.1985), *cert. denied* 474 U.S. 1082 (1986), *reh'g denied*, 481 U.S. 1008 (1987).

A. *The Racketeering Pattern Requirement*

1. *The relatedness of the predicate acts.*

In *H.J. Inc.*, the Supreme Court held that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." 109 S.Ct. at 2900 (emphasis in original). In defining whether predicate acts are "related" under RICO, the Court sought guidance from a sister provision of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922. Looking to Title X of the Act (RICO formed Title IX), the Court found the following language helpful: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated

by distinguishing characteristics and are not isolated events." 109 S.Ct. at 2901 (quoting 18 U.S.C. § 3575(e)).

After reviewing the evidence, we are satisfied that sufficient evidence was admitted upon which the jury reasonably could have found that defendants' conduct toward the plaintiffs had the purpose and effect of acquiring a right of way for the railroad .spur and involved the same participants, victims and methods of commission. This commonality passes muster under the *H.J. Inc.* relatedness standard. *H.J. Inc.*, 109 S. Ct. at 2901. See also *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir.1989) (separate acts involving separate properties are related for purposes of RICO when they involve same participants, same methods, common victim and are not isoliated events).

2. *The continuity requirement.*

We also must determine that there was evidence that defendants' predicate acts extended over a substantial period of time or that they inherently posed a threat of future criminal activity. The Court held that to establish a RICO pattern, the predicates themselves must amount to, or otherwise constitute a threat of continuing racketeering activity. 109 S.Ct. at 2902. Proof that a RICO defendant has been involved in multiple criminal schemes is highly relevant to the inquiry, but not the only method of showing continuity. *Id.* at 2901. The Court directed that we make a case-by-case determination, 109 S.Ct. at 2902, guided by the following principles:

> 'Continuity' is both a closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of

> repetition . . . . It is, in either case, centrally a temporal concept — and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with longterm criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

Id. (citations omitted) (emphasis in the original). In essence, the Court held that before predicates form a RICO pattern, they must span a substantial period of time or, in the alternative, threaten long-term criminal activity. *Id.* at 2902 n.4. Thus plaintiffs' evidence must have shown predicate acts which extended over a substantial period of time in excess of a few weeks or months or which somehow threatened future criminal conduct.

It has been noted that the degree of concrete guidance on defining continuity offered by the Supreme Court in *H.J. Inc.* is debatable. *Swistock v. Jones*, 884 F.2d 755, 757 (3d Cir.1989). We are not limited to the text of *H.J. Inc.* for guidance in this matter, however. In three subsequent decisions, the Court of Appeals for this Circuit has interpreted *H.J. Inc.'s* holding and has suggested when a period of activity is substantial under RICO.

Appendix C

In the first case, *Swistock v. Jones*, 884 F.2d 755 (3d Cir.1989), the Court reversed the district court's dismissal of plaintiff' complaint, finding plaintiffs' allegations that defendants had committed numerous predicate acts of wire fraud and mail fraud for more than two years (*i.e.*, allegations of predicate acts spanning period of approximately fourteen months combined with allegation of further misrepresentations approximately one year later) as well as alleged misrepresentations concerning other potential transactions in the future with plaintiffs were sufficient to allege a RICO pattern. *Id.* at 759.

In a second opinion issued less than one month after *Swistock*, the Court of Appeals found that the plaintiff in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir.1989), had pleaded a pattern of racketeering when she alleged that three perpetrators were involved in at least one open-ended scheme which lasted at least two years and had as its object the defrauding of numerous investors. *Id.* at 1166.

Finally, last month in *Marshall-Silver Construction Co. Inc. v. Mendel*, slip op., (3d Cir. January 18, 1990), the court held that the district court properly dismissed a RICO complaint which alleged predicate acts lasting less than seven months and a scheme of alleged illegal activity which, on the facts alleged, posed no threat of additional repeated criminal conduct over a significant period. Slip op. at 9. The Court of Appeals also cautioned that while continuity is a temporal concept, the time span is not the sole consideration. In doing so, the court indicated that in light of congressional intent behind RICO and the *H.J. Inc.*, holding, it would look for both temporal continuity as well as a significant

societal threat. Slip op. at 8-9.[1]

Keeping in mind that continuity is not only a temporal concept but also is evidenced by a societal threat of future criminal conduct, we will turn to the evidence at hand.

B. *Plaintiffs' Evidence*

In these cases, plaintiffs' complaints identified the RICO violation as defendants' engaging "in fraudulently forcing individuals to sell their property for building a railroad for the purpose of hauling coal . . . ." *E.g.*, Loughman (83-921) Amended Complaint ¶65. Likewise, in the pretrial stipulation plaintiffs' narrative statement identifies a scheme to acquire plaintiff's properties by "false, fraudulent and coercive means . . . ." Pretrial Stipulation (Docket #302) at 4.

Racketeering activity is defined at 18 U.S.C. § 1961(1), and is limited to indictable violations of the federal criminal code. Such violations are usually referred to as predicate acts in a civil RICO context. The complaints in these cases alleged violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341,

---

1. This cautionary language echoes the court's opinion in *Swistock* that

> the length of time over which the predicate acts are alleged to have occurred is relevant, but the fact that the alleged predicates occurred over a short period is not dispositive . . . . Even a closed-ended scheme of short duration, however, could involve a 'distinct threat of long-term racketeering activity, either implicit or explicit.'

884 F.2d at 757.

1343, as the relevant predicate acts. See Amended Complaint of Plaintiff Loughman (83-921), ¶¶64-65, Amended Complaint of Plaintiffs Headlee (83-1679) ¶¶73-74, Amended Complaint of Plaintiffs Hughes (83-1678) ¶¶71-72, Amended Complaint of Plaintiffs Kent (83-1675) ¶¶71-72, Amended Complaint of Plaintiffs Morris and Levine (83-1677) ¶¶74-75, Amended Complaint of Plaintiffs McIntyre (83-1676) ¶¶78-79, Amended Complaint of Plaintiff Estate of John Throckmorton (83-1754) ¶¶72-73, Amended Complaint of Plaintiffs Yesenosky (83-1674) ¶¶72-73.

The mail fraud statute provides criminal penalties for devising "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. The essential elements necessary to establish a violation of Section 1341 are:

> 1. A scheme or artifice to defraud or to obtain money by false or fraudulent pretenses, representations, or promises;
>
> 2. knowing and willful participation in the scheme or artifice by the defendant, with knowledge of its fraudulent nature and with specific intent to defraud; and
>
> 3. the use of the mails in furtherance of the fraudulent scheme.

United States v. Maze, 414 U.S. 395, 398-99 (1974). Similarly, the wire fraud statute proscribes use of the wires with intent to defraud. See 18 U.S.C. § 1343. To bring a private action under Section 1964(c) of RICO, a plaintiff need not show that the

defendant has already been convicted of a predicate act, but plaintiff must make a showing that defendant has committed an indictable act. *Sedima, S.P.R.L. v. Imrex Co.*1, 473 U.S. 479, 481-82 (1985).

With our focus on the scheme alleged in the pretrial papers, we will first address plaintiffs' argument that the jury could have reasonably concluded that a scheme to defraud the plaintiffs arose in or about 1978 on the basis of a letter written by defendant Ewing Pollock to Consolidated Coal Company on October 24, 1978, and admitted into evidence as Plaintiffs' Exhibit 220. Plaintiffs make much of Pollock's recommendation in the 1978 letter that "someone should approach these property owners with a figure they can't refuse." Plaintiffs contend that statement is "language right out of the *Godfather*." Plaintiff's Brief at 6.[2]

The Pollock letter was introduced and admitted at trial through the testimony of defendant Ewing Pollock. In his testimony, Mr. Pollock testified that he generated letters in 1978 and 1979 in connection with the Nineveh Reserves project, which project Pollock testified was different from the 1981 Manor reserves project at th heart of these lawsuits. (Tr. 892-93, 2199, 2204). Further, there was testimony by Mr. Cecil, executive vice president of Consolidated Coal Company, that the Manor reserves were acquired in 1980, two years after Pollock wrote the letter in question. (Tr. 1511). The closing for the acquisition of the

---

2. If plaintiffs' counsel insist on indulging in this kind of rhetorical extravagance, we will at least require a measure of accuracy in this cinematic allusion. The line from the movie involved an offer that could not be refused, a term that connotes a wide range of persuasive and presumably coercive incentives. A figure connotes a dollar amount, something we find innocuous and infinitely less threatening in this context.

Manor reserves was in January, 1981. (Tr. 1587). Given the unrefuted testimony that Mr. Pollock's involvement in 1978 had no relationship to the Manor reserves project, we find that the jury could not reasonably have considered the 1978 letter an indictable predicate act.

To show that they presented evidence sufficient to support a finding that the property acquisition scheme in this case either extended over a substantial period of time or else posed a threat of continued criminal conduct, plaintiffs first point to examples of "alleged threats of long-term repetitive future harm".

For instance, plaintiffs cite testimony given by plaintiff Larry Levine that defendant Boggs threatened that the railroad would use its vast financial and legal resources to crush the Levine family business if they refused to sell their land. (Tr. at 451). Levine's testimony is that this statement was made in late August or early September of 1981. (Tr. at 450). On its face, there is no indication that this statement contained any temporal reference from which the jury reasonably could have inferred longterm conduct nor do we find evidence that it constitutes a predicate act of mail or wire fraud. Likewise, testimony of plaintiff Mark Headlee that defendant Boggs represented that the railroad could place the tracks within ten feet of the Headlee home without taking precautions for the Headlee children's safety, (Tr. at 27), refers to a statement made in a face-to-face meeting sometime between early Fall 1981 and February 1982. (Tr. at 19-20, 24, 53-53). As a matter of law, it does not constitute a predicate act of mail or wire fraud. Also, the statement does not contain a promise or implication of future mail or wire fraud.

We find similar deficiencies with testimony concerning statements by plaintiffs Kent and Yesenosky (Tr. 246, 492, 528-29):

none of these activities pose a threat of future predicate acts of mail or wire fraud. In citing them, we believe plaintiffs have misconstrued the nature of the threat required by RICO. Preventing longterm criminal conduct is the target of RICO, and not the longterm consequences of each isolated predicate act. The Court in *H.J. Inc.*, held that what must be continuous are the RICO predicate acts or offenses, and gave no such significance to the effects of the overall scheme. 109 S.Ct. at 2902. See also *Swistock v. Jones*, 884 F.2d at 757.

Plaintiffs compare the evidence in these cases to the example given by the Supreme Court in *H.J. Inc.* concerning threatened future criminal activity. In the Court's example, a hoodlum sells window "insurance" to storekeepers, telling them he will return monthly to collect the "premium." 109 S.Ct. at 2902. The difference between the pattern of activity in the Supreme Court's window insurance example and that shown in the instant case illustrates the irrelevance of the evidence highlighted to the Court in plaintiffs' submission. In the hypothetical, the defendant engages in a continuing scheme of fraud with both an illegal means and goal. The continuing nature of his conduct is express; he conveys to his victim that he will return the following month to "collect." We find no evidence in the record that defendants approached these plaintiffs or other individuals to propose other potential transactions. To the contrary, the plaintiffs testified that defendants had not contacted plaintiffs after obtaining the rights of way needed for the Manor Reserve project. (Tr. at 40, 252, 472)

In its discussion, the Court in *H.J. Inc.*, gave an alternate example of cognizable threatened continuity as the case where "predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 2902. Defendants' goal of developing the Manor Reserves in

the instant case cannot fairly be equated with the obviously illegitimate goal of the window insurance salesman. No evidence as produced to show defendants' goal was illegal. Rather, the evidence introduced addressed the means used by defendants to acquire plaintiffs' property. The longterm project, *i.e.*, developing the coal reserve, was never questioned. Plaintiffs argue that the magnitude of the project itself posed a societal threat and impact. For instance, the partnership agreement called for development of two coal reserves and five mines. Contrary to plaintiffs' argument, however, the jury was not presented any evidence that any additional right of way would be required by the defendants after the spur in question was completed. Rather, Mr. Cecil, executive vice president of Consolidated Coal Company, testified to the nature of the overall project of developing the Manor reserves, and that the project included building the railroad spur from the cleaning plant at the mine to connect, eventually, to Baltimore. (Tr. at 1518-19). Plaintiffs suggest that the jury could infer from this evidence that defendants posed a threat of future criminal activity. No reasonable person could find in this evidence an implicit threat of future criminal conduct.

Our review of the record reveals that the evidence at trial showed, at the longest, a course of conduct of approximately one year, from June 1981 to June 1982. The unrefuted testimony of defendants and the exhibits introduced therein established that the coal company defendants and the railroad first met to consider a joint land acquisition project in June, 1981. (Tr. 1087,1345). Defendant Upshur Agency was retained in July 1981 to commence the project. (Tr. at 985-86, 993). The plaintiffs testified to contact with various land agents commencing in or about September, 1981 and ending in June, 1982. (Tr. 19-24, 52-53 (Headlee); 159-60, 179 (McIntyres); 292 (Yesenosky); 328-29, 354 (Hughes); 394, 397 (Levine); 490 (Kent); 568 (Loughman), 661-75 (Attorney Floyd

concerning Throckmorton). Testimony of nonplaintiffs whose property was acquired after June, 1982, established that their sales to defendants were arms length transactions conducted with assistance of legal counsel and not allegedly fraudulent or coerced. (Tr. 789-807, 765). We find that the only evidence of predicate mail and wire fraud acts was evidence of acts occurring between June, 1981 and June, 1982. The only evidence of the use of the mails falling outside this time period were the Pollock letters of 1978-80, which we have previously discussed, and letters sent by the coal company to Conrail in January, 1981, which had no connection to any alleged scheme to defraud. The phone calls which were identified as made in connection with the acquisition of plaintiffs' property occurred within the June 1981 through June 1982 period. (Tr. 131, 177-78, 249, 332, 362, 1810).

This reading of the evidence is consistent with Judge Teitelbaum's overview of the evidence presented:

> The evidence presented by plaintiffs at most showed only that the so-called "scheme" of the defendants had but a single, discrete objective — namely, to purchase the right-of-way needed to build a rail line. Such a scheme was not open-ended. It had a discrete temporal ending point. *The scheme was completed and came to an end once the necessary properties were acquired.* The scheme also was self-limiting in its scope. It involved only a discrete number of properties necessary to complete the right of-way. Such self-imposed limitations were inherent to the scheme as depicted by plaintiffs.

Memorandum Opinion, October 22, 1987 (Docket #391) at 9

(emphasis added).

Our review of *H.J. Inc.* and its progeny brings us to the conclusion that twelve months of the described activity by an association of businesses with a discrete objective does not pose the societal threat of continuing criminal activity required by RICO. *H.J. Inc.*, 109 S.Ct. at 2902 (Congress concerned with longterm criminal conduct in passing RICO). See also *Marshall-Silver Construction Co., supra*, slip op. at 8 ("Virtually every garden-variety fraud is accomplished through a series of wire o mail fraud acts that are 'related' by purpose and are spread over period of at least several months."); *Menasco v. Wasserman*, 886 F.2d 681, 684 (4th Cir.1989) (one year of acts by one perpetrator toward two victims does not pose a special threat to social well-being). The post-*H.J.Inc.* cases which have recognized a continuit of criminal activity or threat for RICO purposes have involved activity lasting at least twice as long as the acts in this case lasted. *Swistock*, 884 F.2d at 759 (activity lasting more than two years); *Shearin*, 885 F.2d at 1166 (alleged racketeering lasted at least two years); *Walk v. Baltimore & Ohio Railroad*, 890 F.2d 688 (4th Cir.1989) (ten years of racketeering is a substantial period); *Newmyer v. Philatelic Leasing, Ltd*, 888 F.2d 385, 396 (6th Cir.) (five year scheme to defraud hundreds of taxpayers is cognizable RICO pattern), reh'g denied ____ F.2d ____ (1989); *Morley v. Cohen*, 888 F.2d 1006, 1010 (4th Cir.1989) (allegations of racketeering activities from 1976 to 1981 are sufficient to meet continuity requirement); MDO Development Corp. v. Kelly, 726 F.Supp. 79 (S.D.N.Y. 1989) (acts of depositing 91 Checks with forged payees and endorsements over 2-3 year period violated RICO).

Finally, plaintiffs argue that by establishing evidence of the presence of other schemes, they presented to the jury evidence

which could establish a threat of continuing criminal conduct. Specifically, plaintiffs refer to two collateral fraudulent schemes: defendants' nonpayment of real estate transfer taxes and defendants' misrepresentations to plaintiffs concerning the federal government's treatment of these property sales for purposes of personal income taxes. We do not see these acts as separate schemes to defraud in light of the evidence that at lease the second "collateral scheme" was presented as an element of the overall scheme to defraud plaintiffs. Moreover, proof of multiple schemes alone will not establish a RICO violation without continuity or a threat thereof. *H.J. Inc.*, 109 S.Ct. at 2901. In light of our holding that no evidence of continuity was presented to the jury, the existence of other schemes is irrelevant.

Defendants' Motion for JNOV is granted.

BY THE COURT,

s/ D. Brooks Smith
United States District Judge

cc: All Counsel of Record

APPENDIX D — MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED MAY 17, 1988

CIVIL ACTION No. 83-921

DOROTHY LOUGHMAN

Plaintiff

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MGH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION No. 83-1674

JOHN W. YESENOSKY, JR., and LINDA M. YESENOSKY,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY

CO., a corp.; WILLIAM REESE, an individual; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION No. 83-1675

PAUL H. KENT and MABEL KENT,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

Appendix D

CIVIL ACTION No. 83-1676

JAMES C. McINTYRE and GLENNA McINTYRE,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; MIKE WILSON, and individual; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION No. 83-1677

LARRY LEVINE, DAN LEVINE, MORRIS LEVINE, EDWARD LEVINE, individuals; and MORRIS LEVINE ENTERPRISES, INC., a corp.; and LEVINE IRON AND METAL, INC., a corp.;

Plaintiffs

v.

Appendix D

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MGH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION No. 83-1678

JAMES E. HUGHES and LINDA L. HUGHES,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; WILLIAM REESE, an individual; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

Appendix D

CIVIL ACTION No. 83-1679

MARK E. HEADLEE and CHARLOTTE HEADLEE,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MGH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION No. 83-1754

THOMAS J. ALLEN, Esquire, Personal Representative of the Estate of JOHN T. THROCKMORTON,

Plaintiffs

v.

Appendix D

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

MEMORANDUM OPINION

I.

On February 25, 1987, judgment had been entered in favor of the plaintiffs and against the defendants in each of the above-captioned cases after completion of a jury trial and in accordance with the jury's Answers to Special Interrogatories.

Those judgments subsequently were vacated on October 22, 1987. Among other things, judgment notwithstanding the jury verdict was entered in favor of the defendants and against the plaintiffs with respect to the claims that said defendants had violated 18 U.S.C. §§ 1962(c) and (d). It was held that plaintiffs had failed to offer any proof that defendants had engaged in a "pattern" of racketeering activity.

Presently before the Court is a Motion For Reconsideration of Order Granting J.N.O.V. on RICO claims. Plaintiffs maintain

that the grants of J.N.O.V. should be vacated because the United States Court of Appeals for the Third Circuit has explicitly rejected in another case the definition of "pattern" relied upon by this Court in granting J.N.O.V. The motion will be granted.

II.

Plaintiffs claim that defendants violated 18 U.S.C. §§ 1962(c) and (d) of RICO.

Proof of a violation of 18 U.S.C. § 1962(c) requires a showing of: (1) the conducting of, (2) an enterprise, (3) thorough a pattern, (4) of racketeering activity. *See Sedima S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 496 (1985). "Racketeering activity" is defined at 18 U.S.C. § 1961(1) as including a long list of state and federal criminal offenses, among which are mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). A "pattern" of racketeering activity is defined as requiring "at least two acts of racketeering activity." 18 U.S.C. § 1961(5).

The Supreme Court stated in dictum in *Sedima* that although two acts of racketeering activity are required for a "pattern", they may not be sufficient. *Sedima*, 473 U.S. at 496 n. 14. The Court further stated that:

> The legislative history supports the view that two isolated acts of racketeering do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which

> combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969).

Sedima, Id.

This Court, like many others, interpreted this dictum in *Sedima* as a signal that a limiting construction of RICO should be fashioned around the "pattern" requirement and the concepts of "continuity" and "relationship". In particular, this Court held that racketeering activity committed in furtherance of a single scheme consitutes a "pattern" for RICO purposes only if the scheme is potentially ongoing and open-ended.

J.N.O.V. was entered in favor of all defendants and against all plaintiffs with respect to 18 U.S.C. § 1962(c) because plaintiffs had failed to offer any proof from which it could reasonably be inferred that defendants had engaged in a "pattern" of racketeering activity. More precisely, it was held that plaintiffs had not offered any evidence that the alleged scheme of the defendants was ongoing or open-ended. J.N.O.V. likewise was entered in favor of all defendants with respect to 18 U.S.C. § 1962(d) because plaintiffs had failed to offer any proof that defendants had conspired to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity.

Just one week after the entries of J.N.O.V. on October 22, 1987, the United States Court of Appeals for the Third Circuit expressly *rejected* the requirement that racketeering acts committed pursuant to a single scheme can constitute a "pattern" for RICO purposes only if the scheme is potentially ongoing or open-ended. *Barticheck v. Fidelity Union Bank/First National Bank*, 832 F.2d 36, 39 (3d Cir. 1987). The *Barticheck* court further stated that:

Appendix D

> We read the legislative history's reference to "continuity" as simply calling for an inquiry into the *extent* of the racketeering activity. Although temporal open-endedness may be one measure of *extent*, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently *extensive* to be "continuous." This determination necessarily depends on the circumstances of the particular case. (Emphasis added.)

Sedima, Id.

Factors relevant to such a case-by-case determination include, but are not limited to the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of perpetrators, and the character of the unlawful activity. *See Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 62, 66 (3d Cir. 1987); *also, Barticheck*, 832 F.2d at 39.

Applying the above analysis to the present cases, this Court now finds that plaintiffs did present evidence from which a jury could reasonably infer that defendants had engaged in racketeering activity which was extensive enough that it constituted a "pattern." Plaintiffs have come forward with evidence that the "scheme" in question was carried out by ten (or more) perpetrators; that the "scheme" lasted from July of 1981 until sometime in early-1982; that similar misrepresentations were made in every case; and that the "scheme" was carried out against at least eight different sets of plaintiffs.

Defendants have offered a number of reasons, other than the failure of plaintiffs to offer any proof of a "pattern" of

racketeering activity, why the entries of J.N.O.V. should stand. The Court has considered those reasons and finds them to be without merit.

Those portions of the Orders of October 22, 1987 granting J.N.O.V. in favor of all defendants and against all plaintiffs with respect to the claims brought pursuant to 18 U.S.C. §§ 1962(c) and (d) will be vacated. That portion of those Orders specifying that defendants will be granted a new trial limited only to the issue of damages, unless plaintiffs agreed within ninety (90) days to a remittitur in an amount to be negotiated by the parties, will *not* be vacated. There is no indication at this time that such a remittitur has been agreed to. Consequently, the date for a new trial will be set once the Court has had an opportunity to confer with the parties in the near future.

An appropriate order will be issued.

Dated: May 17, 1988.

By: Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 22, 1987

CIVIL ACTION No. 83-1679

MARK E. HEADLEE and CHARLOTTE HEADLEE,

Plaintiffs

v.

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

CIVIL ACTION NO. 83-1754

CAROLYN SCHULTZ, COLLEEN ABEL, and BETH MEIGHEN, as heirs of the Estate of JOHN T. THROCKMORTON,

Plaintiffs

v.

Appendix E

CONSOL-PENNSYLVANIA COAL CO., a corp.; RHEINBRAUN U.S., a corp.; MONONGAHELA RAILWAY CO., a corp.; DAVID BOGGS, an individual; EWING POLLOCK, an individual; and the law firm of POLLOCK, POLLOCK and THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT CO.; MARIA THERESIA BERGBAUGESELLSCHAFT MBH.; and RHEINISCHE BRAUNKOHLENWERKE,

Defendants.

MEMORANDUM OPINION

Judgment previously was entered in favor of plaintiffs and against defendants in each of the above-captioned cases after completion of a jury trial.

Several motions presently are before the Court.

All defendants have filed motions for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial. JNOV will be granted for all defendants with respect to the claims that they violated 18 U.S.C. §§ 1962(c) and (d). JNOV will not be granted, however, with respect to the claims for common law fraud and conspiracy to defraud. In addition, because the Court finds that the damages awarded to plaintiffs are obscenely excessive and contrary to the great weight of the evidence concerning damages, unless plaintiffs agree to a remittitur defendants will be granted a new trial limited to the issue of damages to be awarded to plaintiffs.

This Court previously had denied plaintiffs' motion for an

award of delay damages pursuant to Pa. R.C.P. 238, 42 Pa. C.S.A. (Purdon's 1987). Plaintiffs have filed a motion for reconsideration. The Court has reconsidered and now finds that plaintiffs are entitled to delay damages. In the event that plaintiffs do agree to a remittitur, delay damages are to be included in that amount.

Defendants have argued that Civil Action No. 83-1754 should be dismissed because the plaintiffs named therein — Carolyn Schultz, Coleen Abel, and Beth Meighen — are not the real parties in interest in that case. Defendants are correct in maintaining that these individuals are not the real parties in interest. Even so, Civil Action No. 83-1754 will not be dismissed. Rather, plaintiffs will be given ninety (90) days in which to substitute the real party in interest.

Defendant Upshur Agency, Inc., has filed a motion to compel plaintiffs to satisfy any judgment against it. The motion will be denied.

Finally, plaintiffs have petitioned for an award of attorney's fees, costs, and expenses. The motion will be denied in light of the granting of JNOV for the defendants with respect to 18 U.S.C. §§ 1962(c) and (d).

I.

The standard to be applied when considering a motion for JNOV is a familiar one. Such a motion may be granted only when, without considering the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. JNOV may not be granted, however, when there is conflicting evidence, or even insufficient evidence, to conclusively establish the movant's

case. *See* 5A J. Moore and J. Desha Lucas, Moore's Federal Practice ¶ 50.07[2] (2d ed. 1986).

Plaintiffs claimed, among other things, that defendants had violated 18 U.S.C. §§ 1962(c) and (d).

18 U.S.C. § 1962(c) provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . .

Proof of a violation of 18 U.S.C. § 1962(c) requires a showing of: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima S.P.L.R. v. Imrex Co.*, ____U.S.____, 87 L.Ed.2d 346, 358-59 (1985).

18 U.S.C. § 1961(1) defines "racketeering activity" as including a long list of specified state and federal criminal offenses, including mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).

A "pattern" of racketeering activity is defined at 18 U.S.C. § 1961(5) as requiring "at least two acts of racketeering activity" within a specified period of time. Beyond this, however, the statute itself says nothing concerning whether anything further is required for a "pattern" of racketeering activity.

Although certain comments in *Sedima* unquestionably are

dicta, they very strongly suggest that something more than just two racketeering acts is required for a "pattern" of racketeering activity for purposes of RICO. The Court noted that the above definition of "pattern":

> *requires* at least two acts of racketeering activity. . .not that it "means" two such acts. The implication is that while two such acts are necessary, they may not be sufficient. Indeed, in a common parlance two of anything do not generally form a pattern.

Sedima, ____ U.S. at ____, n. 14, 87 L.Ed.2d at 358, n. 14.

The Court then considered the legislative history of RICO to ascertain what else is required for a "pattern" of racketeering activity:

> The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep.No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' requires the showing of a relationship. . .So, therefore, proof of two acts

> of racketeering activity, without more, does not establish a pattern. . ." 116 Cong.Rec. 18940 (1970) (Statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

Sedima, ____U.S. at ____, n. 14, 87 L.Ed.2d at 358-359, n. 14.

Finally, the Court looked to another provision of the same bill for further illumination:

> Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This langugage may be useful in interpreting other sections of the Act. Cf. *Ianelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

Many courts that have been confronted with questions concerning whether more than just two predicate acts are required for a "pattern" of racketeering activity have capitalized on the above remarks in *Sedima* that proof of a "pattern" also requires a showing that the racketeering acts were continuous and related. *See*, e.g., *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 2567 (8th Cir. 1986); *also Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 (10th Cir. 1987).

Appendix E

Unfortunately (and not surprisingly), *Sedima* does not indicate how this additional requirement of "continuity plus relationship" is to be understood. In particular, the continuity requirement has caused considerable difficulty. Those courts that have attempted to capitalize on the remarks in *Sedima* are in general agreement that a plaintiff must demonstrate some facts from which at least the threat of "ongoing illegal conduct" may be inferred. A scheme to achieve a single, discrete objective, without more, does not create a threat of ongoing activity because the scheme will terminate when that objective has been achieve. *See Towest DBC*, 810 F.2d at 928-929.[1] Put another way, a scheme must be "open-ended" in some demonstrable way — e.g., in time, or in those whom it will victimize, or in the means employed to further the objectives of the scheme — in order for it to be continuous.

JNOV will be granted for all defendants and against all plaintiffs with respect to 18 U.S.C. § 1962(c) because plaintiffs failed to offer any proof from which it reasonably could be inferred that defendants engaged in a "pattern" of racketeering activity for RICO purposes, as that term just has been construed. More precisely, plaintiffs have not offered any evidence which could be taken as showing that the alleged scheme in which defendants were engaged was continuous — i.e., ongoing.

The evidence presented by plaintiffs at most showed only that the so-called "scheme" of the defendants had but a single, discrete objective — namely, to purchase the right-of-way needed to build a rail line. Such a scheme was not open-ended. It had a discrete temporal ending-point. The scheme was completed and came to an end once the necessary properties were acquired. The

---

1. But see *United States v. Ianello*, 808 F.2d 184, 189-193 (2d Cir. 1986) for a contrary view.

scheme also was self-limiting in its scope. It involved only a discrete number of properties necessary to complete the right-of-way. Such self-imposed limitations were inherent to the scheme as depicted by plaintiffs.

II.

As was noted previously, plaintiffs also claimed that defendants had violated 18 U.S.C. § 1962(d), which provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The object of a RICO conspiracy must be to violate a substantive RICO provision. *See United States v. Hampton*, 786 F.2d 977, 978 (10th Cir. 1986). Proof that a defendant violated 18 U.S.C. § 1962(d) by conspiring to violate 18 U.S.C. § 1962(c) requires more than proof that the defendant merely conspired to commit the predicate offenses necessary to establish a "pattern." Rather, it must be shown that the defendant conspired to "participate. . .in the conduct of such enterprise's affairs through a pattern of racketeering activity." *United States v. Elliott*, 57 F.2d 880, 903 (5th Cir. 1978); *also Medallion TV Enterprises v. SELECTV, Inc.*, 627 F. Supp. 1290, 1301 (C.D. Cal. 1986).

Not only did plaintiffs fail to produce evidence which could support the inference that defendants engaged in a "pattern" of racketeering activity, they also failed to produce evidence which could support the inference that defendants *conspired* to participate in the conduct of the affairs of an enterprise *through a pattern* of racketeering activity. JNOV therefore also will be granted for

all defendants and against all plaintiffs with respect to 18 U.S.C. § 1962(d).

JNOV will not, however, be granted with respect to plaintiffs' remaining claims that defendants committed common law fraud and conspired to commit common law fraud. There is evidence which could support these claims.

III.

A new trial may be ordered should the trial court find that the damages awarded by the jury are grossly excessive. *See* 6A J. Desha Lucas, Moore's Federal Practice ¶ 59.08[6] (3d ed. 1987).

The jury awarded the following compensatory damages: to Dorothy Loughman (Civil Action No. 83-921) it awarded $1,450,000; to John and Linda Yesenosky (Civil Action No. 83-1674) it awarded $435,000; to Paul and Mabel Kent (Civil Action No. 83-1675) it awarded $747,500; to James and Glenna McIntyre (Civil Action 83-1676) it awarded $48,000; to Morris Levine Enterprises it awarded $775,000; and to Levine Iron and Metal (Civil Action 83-1677) it awarded $438,000; to James and Linda Hughes (Civil Action No. 83-1678) it awarded $122,000; to Mark and Charlotte Headlee (Civil Action No. 83-1679) it awarded $895,000; and to Carolyn Schultz, Colleen Abel, and Beth Meighen, the heirs of John T. Throckmorton (Civil Action No. 83-1754), it awarded $450,000. Such damages are obscenely excessive and are against the great weight of the evidence concerning damages.

For all practical purposes, the sole evidence concerning the fair market values of plaintiffs' properties came from Mr. Gary Bodnar, plaintiffs' expert witness. A comparison of the damages

awarded with those figures propounded by Mr. Bodnar leaves one with the inescapable impression that the jury relied almost entirely on his testimony in determining damages.

The overwhelming evidence indicates that plaintiffs' properties were worth far less than those values awarded by the jury. For example, the jury awarded the Hughes' (Civil Action No. 876-1678) $122,000 in damages, even though they had purchased that same property some four years earlier for a mere $9,500. Dorothy Loughman (Civil Action No. 83-921) had sold ten acres of her property for only $800 per acre approximately six years prior to the sale of another portion of the same property to defendants. The jury, however, awarded her damages amounting to approximately $100,000 per acre for the portion of her property she sold to defendants. The Yesenoskys had listed their property as being for sale in 1980 for $40,000. The jury awarded the Yesenoskys $435,000 in damages for the sale of their property to defendants less than two years later.

The problem is not confined only to the damages awarded to these particular plaintiffs. As was pointed out, the jury obviously relied heavily on the testimony of Mr. Bodnar, who explained on cross-examination that his figures were based largely on the prices paid to three (out of some fifty) landowners who were the last to sell their properties for the railroad right-of-way; Grover Phillipi ($146,670 per acre); John Culp ($75,216 per acre); and Sarah Closser ($240,108 per acre). All other sales, except for these three, were ignored by Mr. Bodnar in ascertaining the fair market value of plaintiffs' properties.

It defies reason to infer that these three sales, all of them by "hold-outs", are indicative in any way of the fair market values of the properties of those who were among the earliest to sell.

Appendix E

It is far more reasonable to infer that the prices paid to Phillipi, Culp, and Closser for their properties were far in excess of their true market values — because the defendants were operating under severe time constraints — than it is to infer that the fair market values of plaintiffs' properties can be based on the prices paid to Phillipi, Culp, and Closser.

A court is not required to order a new trial when it finds that the damages awarded are excessive and shocking to its conscience. The court instead may use the remittitur device, whereby it may refuse to order a new trial on condition that plaintiffs agree to remit a specified amount. 6A J. Desha Lucas, Moore's Federal Practice ¶ 59.08[7] (3d ed. 1987).

Remittitur is appropriate in this case in light of the fact that a new trial, even though it would be limited only to the issue of damages, in all likelihood would consume the time of both the court and all parties. It is not possible, however, for the Court to state with any degree of exactitude what would be an appropriate amount for plaintiffs to remit. The inability of the Court to state precisely what amounts should be remitted poses no obstacle here, however. The parties hereby are directed to seek an accommodation as to the damages to be remitted in each case. Should the parties be unable to reach an accommodation within ninety (90) days, a new trial limited only to the issue of damages will be ordered. See *Zavala v. Citicorp Services*, 426 F.Supp. 241, 244 (S.D.N.Y. 1976).[2]

---

2. Were the Court able to state with any precision what amount should be remitted by plaintiffs, it then would increase the remainder by adding delay damages, pursuant to Pa.R.C.P., 42 Pa.C.S.A. Delay damages should be included in the remittitur agreed to by the parties, in the event that they are able to agree to a remitted amount.

Appendix E

IV.

Civil Action No. 83-1754 was commenced by Carolyn Schultz, Colleen Abel, and Beth Meighen in their own names (and as the heirs of John T. Throckmorton) after the death of Mr. Throckmorton and after the appointment of his personal representative.

Every action must be prosecuted in the name of the real party in interest. Fed.R.Civ.P. 17(a). Plaintiffs Schultz, Abel, and Meighen are not the real parties in interest in Civil Action No. 83-1754 and thus are not entitled to bring the action in their own names. 20 Pa.C.S.A. § 3373 (Purdon's 1975) provides that such actions may be "brought by. . .[the decedent's] representative alone." Any action which survives a decedent must be initiated by (or against) the decedent's personal representative. *See D'Orazio v. Locust Lake Village*, 406 A.2d 550, 551 (Pa. Super. 1979).

The action at Civil Action No. 83-1754 will not be dismissed at this time, even though it has not been brought by the real party in interest. Rather, plaintiffs will be given ninety (90) days in which to substitute John T. Throckmorton's personal representative as the plaintiff in that action. *See* Fed.R.Civ.P. 17(a).

V.

Defendant Upshur Agency, Inc. filed for reorganization under Chapter 11 of the Bankruptcy Code. An automatic stay went into effect on June 13, 1985. An order was issued by the Bankruptcy Court for the Northern District of West Virginia the day before trial in these actions was to begin. The Order granted plaintiffs relief from the stay in order to permit plaintiffs to proceed to a determination of liability of Upshur Agency, Inc. The order

further provided that:

> . . .any recovery against the debtor shall be limited to insurance proceeds and no recovery shall be made against the debtor's estate without further order of this Court.

Defendant Upshur's Motion to Compel Plaintiffs To Satisfy Judgment Against The Upshur Agency, Inc. will be denied. Although the word "recovery" is not defined, the fair import of the above order is that it refers to payment. Thus, the effect of the Order is that notwithstanding Upshur's bankruptcy, any final judgment in favor of plaintiffs and against Upshur may be paid out of any available insurance proceeds, and that any further payment would, like the claims of any other creditor, be subject to further proceedings in Bankruptcy Court.

Upshur's contention that the judgments should be satisfied because there in fact are no insurance proceeds available in light of the jury verdict is a question to be adjudicated in execution proceedings or in a declaratory judgment action, not in a motion to satisfy judgment.

VI.

Finally, plaintiffs have petitioned for an award of attorney's fees, costs, and expenses for prevailing under RICO.

18 U.S.C. § 1964(c) provides in relevant part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . .shall recover. . .a reasonable attorney's fee.

Appendix E

Plaintiffs' petition must be denied in light of the granting of JNOV for defendants with regard to the claims that they violated 18 U.S.C. § 1962(c) and (d).

An appropriate order will be issued.

Dated: October 22, 1987.

By: Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

APPENDIX F - VERDICT

UNITED STATES OF AMERICA

ss:

DISTRICT OF

I, Catherine D. Martrano, Clerk of the United States District Court for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Pleading 361 Verdict Slip, Pleading 362 Verdict Slip, Pleading #523 Verdict Slip, and Pleading #524 Verdict Slip and Judgment Order of April 11, 1990, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Pittsburgh, this 7th day of August, A.D. 1990.

s/ Catherine D. Martrano
Clerk.

s/ Keith S. Anderson
Keith S. Anderson
Deputy Clerk.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-921

DOROTHY LOUGHMAN,

Plaintiff

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,

Defendants.

Civil Action No. 83-1674

JOHN W. YESENOSKY, JR. and LINDA M. YESENOSKY,

Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,

Defendants.

Civil Action No. 83-1675

PAUL H. KENT and MABEL KENT,

Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,

Defendants.

Appendix F

Civil Action No. 83-1676

JAMES C. McINTYRE and GLENNA McINTYRE,
Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,
Defendants.

Civil Action No. 83-1677

LARRY LEVINE, ET AL.,
Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,
Defendants.

Civil Action No. 83-1678

JAMES E. HUGHES and LINDA L. HUGHES,
Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,
Defendants.

Appendix F

Civil Action No. 83-1679

MARK E. HEADLEE AND CHARLOTTE B. HEADLEE,
Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,
Defendants.

Civil Action No. 83-1754

CAROLYN SCHULTZ, ET AL.,
Plaintiffs

v.

CONSOL PENNSYLVANIA COAL COMPANY, ET AL.,
Defendants.

VERDICT

AND NOW, this 23rd day of February, 1987, we, the jury empaneled in the above-entitled cases, find as follows:

PART A:

1. Did any of the defendants violate 18 U.S.C. § 1962(c) which provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's

affairs through a pattern of racketeering activity,

. . .

with respect to any of the plaintiffs?

YES X NO ___

(If NO, proceed directly to Question 15. If YES, answer Questions 2 through 14.)

2. Did defendant *Consol-Pennsylvania Coal Co.* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES X	NO ___
B.	John Yesenosky and Linda Yesenosky:	YES X	NO ___
C.	Paul Kent and Mabel Kent:	YES X	NO ___
D.	James McIntyre and Glenna McIntyre:	YES X	NO ___
E.	Morris Levine Enterprises:	YES X	NO ___
F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

3. Did defendant *Rheinbraun U.S.* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES X	NO ___

Appendix F

B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

4. Did defendant *Monongahela Railway Co.* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

Appendix F

5. Did defendant *David Boggs* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES	X	NO	____
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	____
C.	Paul Kent and Mabel Kent:	YES	X	NO	____
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	____
E.	Morris Levine Enterprises:	YES	X	NO	____
F.	Levine Iron & Metal, Inc.:	YES	X	NO	____
G.	James Hughes and Linda Hughes:	YES	X	NO	____
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	____
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	____

6. Did defendant *Ewing Pollock* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES	X	NO	____
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	____
C.	Paul Kent and Mabel Kent:	YES	X	NO	____
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	____
E.	Morris Levine Enterprises:	YES	X	NO	____
F.	Levine Iron & Metal, Inc.:	YES	X	NO	____
G.	James Hughes and Linda Hughes:	YES	X	NO	____
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	____

Appendix F

I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ___

7. Did defendant *Pollock and Thomas* violate 18 U.S.C. § 1962(c) with respect to:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___
F. Levine Iron & Metal, Inc.: YES X NO ___
G. James Hughes and Linda Hughes: YES X NO ___
H. Mark Headlee and Charlotte Headlee: YES X NO ___
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ___

8. Did defendant *Upshur Agency, Inc.* violate 18 U.S.C. § 1962(c) with respect to:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___

Appendix F

F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

9. Did defendant *Consolidation Coal Co.* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES X	NO ___
B.	John Yesenosky and Linda Yesenosky:	YES X	NO ___
C.	Paul Kent and Mabel Kent:	YES X	NO ___
D.	James McIntyre and Glenna McIntyre:	YES X	NO ___
E.	Morris Levine Enterprises:	YES X	NO ___
F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

10. Did defendant *Consol-Land Development Co.* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES X	NO ___

Appendix F

B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

11. Did defendant *Maria Theresia Bergbaugesellschaft* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

Appendix F

12. Did defendant *Rheinische Braunkohlenwerke* violate 18 U.S.C. § 1962(c) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

13. Did defendant *William Reese* violate 18 U.S.C. § 1962(c) with respect to:

A.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
B.	James Hughes and Linda Hughes:	YES	___	NO	X

14. Did defendant *Mike Wilson* violate 18 U.S.C. § 1962(c) with respect to:

A.	James McIntyre and Glenna McIntyre:	YES	___	NO	X

(END OF PART A)

Appendix F

PART B:

15. Did any of the defendants violate 18 U.S.C. § 1962(d) which provides in relevant part as follows:

> It shall be unlawful for any person to conspire to violate . . . subsection (c) of this section,

with respect to any of the plaintiffs:

YES X NO ____

(If NO, proceed directly to Question 29. If YES, answer Questions 16 through 28).

16. Did defendant *Consol-Pennsylvania Coal Co.* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES X	NO ____
B.	John Yesenosky and Linda Yesenosky:	YES X	NO ____
C.	Paul Kent and Mabel Kent:	YES X	NO ____
D.	James McIntyre and Glenna McIntyre:	YES X	NO ____
E.	Morris Levine Enterprises:	YES X	NO ____
F.	Levine Iron & Metal, Inc.:	YES X	NO ____
G.	James Hughes and Linda Hughes:	YES X	NO ____
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ____
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ____

Appendix F

17. Did defendant *Rheinbraun U.S.* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	___	NO	X
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

18. Did defendant *Monongahela Railway Co.* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___

Appendix F

H. Mark Headlee and Charlotte Headlee: YES X NO ___
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ___

19. Did defendant *David Boggs* violate 18 U.S.C. § 1962(d) with respect to:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___
F. Levine Iron & Metal, Inc.: YES X NO ___
G. James Hughes and Linda Hughes: YES X NO ___
H. Mark Headlee and Charlotte Headlee: YES X NO ___
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ___

20. Did defendant *Ewing Pollock* violate 18 U.S.C. § 1962(d) with respect to:

A. Dorothy Loughman: YES ___ NO X
B. John Yesenosky and Linda Yesenosky: YES ___ NO X
C. Paul Kent and Mabel Kent: YES ___ NO X

Appendix F

D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

21. Did defendant *Pollock, Pollock and Thomas* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

22. Did defendant *Upshur Agency, Inc.* violate 18 U.S.C. § 1962(d) with respect to:

Appendix F

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

23. Did defendant *Consolidation Coal Co.* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___

Appendix F

I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

24. Did defendant *Consol-Land Development Co.* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

25. Did defendant *Maria Theresia Bergbaugesellschaft* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	___	NO	X
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X

Appendix F

F.	Levine Iron & Metal, Inc.:	YES	___	NO	x
G.	James Hughes and Linda Hughes:	YES	___	NO	x
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	x
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	x

26. Did defendant *Rheinische Braunkohlenwerke* violate 18 U.S.C. § 1962(d) with respect to:

A.	Dorothy Loughman:	YES	___	NO	x
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	x
C.	Paul Kent and Mabel Kent:	YES	___	NO	x
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	x
E.	Morris Levine Enterprises:	YES	___	NO	x
F.	Levine Iron & Metal, Inc.:	YES	___	NO	x
G.	James Hughes and Linda Hughes:	YES	___	NO	x
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	x
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	x

27. Did defendant *William Reese* violate 18 U.S.C. § 1962(d) with respect to:

A.	John Yesenosky and Linda Yesenosky:	YES	___	NO	x

Appendix F

B. James Hughes and Linda Hughes: YES ___ NO X

28. Did defendant *Mike Wilson* violate 18 U.S.C. § 1962(d) with respect to:

A. James McIntyre and Glenna McIntyre: YES ___ NO X

29. Did any of the defendants engage in a civil conspiracy with respect to any of the plaintiffs?

YES X NO ___

If NO, proceed directly to Question 43. If YES, answer Questions 30 through 42.)

30. Did defendant *Consol-Pennsylvania Coal Co.* engage in a civil conspiracy with respect to:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___
F. Levine Iron & Metal, Inc.: YES X NO ___
G. James Hughes and Linda Hughes: YES X NO ___
H. Mark Headlee and Charlotte Headlee: YES X NO ___

Appendix F

I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ____

31. Did defendant *Rheinbraun U.S.* engage in a civil conspiracy with respect to:

A. Dorothy Loughman: YES X NO ____
B. John Yesenosky and Linda Yesenosky: YES X NO ____
C. Paul Kent and Mabel Kent: YES X NO ____
D. James McIntyre and Glenna McIntyre: YES X NO ____
E. Morris Levine Enterprises: YES X NO ____
F. Levine Iron & Metal, Inc.: YES X NO ____
G. James Hughes and Linda Hughes: YES X NO ____
H. Mark Headlee and Charlotte Headlee: YES X NO ____
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ____

32. Did defendant *Monongahela Railway Co.* engage in a civil conspiracy with respect to:

A. Dorothy Loughman: YES X NO ____
B. John Yesenosky and Linda Yesenosky: YES X NO ____
C. Paul Kent and Mabel Kent: YES X NO ____
D. James McIntyre and Glenna McIntyre: YES X NO ____
E. Morris Levine Enterprises: YES X NO ____

Appendix F

F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

33. Did defendant *David Boggs* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

34. Did defendant *Ewing Pollock* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___

Appendix F

B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

35. Did defendant *Pollock, Pollock and Thomas* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

Appendix F

36. Did defendant *Upshur Agency, Inc.* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

37. Did defendant *Consolidation Coal Co.* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___

Appendix F

H. Mark Headlee and Charlotte Headlee: YES X NO ____
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ____

38. Did defendant *Consol-Land Development Co.* engage in a civil conspiracy with respect to:

A. Dorothy Loughman: YES X NO ____
B. John Yesenosky and Linda Yesenosky: YES X NO ____
C. Paul Kent and Mabel Kent: YES X NO ____
D. James McIntyre and Glenna McIntyre: YES X NO ____
E. Morris Levine Enterprises: YES X NO ____
F. Levine Iron & Metal, Inc.: YES X NO ____
G. James Hughes and Linda Hughes: YES X NO ____
H. Mark Headlee and Charlotte Headlee: YES X NO ____
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ____

39. Did defendant *Maria Theresia Bergbaugesellschaft* engage in a civil conspiracy with respect to:

A. Dorothy Loughman: YES X NO ____
B. John Yesenosky and Linda Yesenosky: YES X NO ____
C. Paul Kent and Mabel Kent: YES X NO ____
D. James McIntyre and Glenna McIntyre: YES X NO ____

Appendix F

E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

40. Did defendant *Rheinische Braunkohlenwerke* engage in a civil conspiracy with respect to:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

41. Did defendant *William Reese* engage in a civil conspiracy with respect to:

Appendix F

A. Yesenosky and Linda Yesenosky: YES X NO ___
B. James Hughes and Linda Hughes: YES X NO ___

42. Did defendant *Mike Wilson* engage in a civil conspiracy with respect to:

A. James McIntyre and Glenna McIntyre: YES X NO ___

(END OF PART C)

43. Did any of the defendants defraud any of the plaintiffs?

YES X NO ___

(If NO, proceed directly to Question 57. If YES, answer Questions 44 through 56.)

44. Did defendant *Consol-Pennsylvania Coal Co.* defraud any of the following:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___
F. Levine Iron & Metal, Inc.: YES X NO ___
G. James Hughes and Linda Hughes: YES X NO ___

Appendix F

H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

45. Did defendant *Rheinbraun U.S.* defraud any of the following:

A.	Dorothy Loughman:	YES	___	NO	X
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

46. Did defendant *Monongahela Railway Co.* defraud any of the following:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___

D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	.NO	___

47. Did defendant *David Boggs* defraud any of the following:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

48. Did defendant *Ewing Pollock* defraud any of the following:

Appendix F

A.	Dorothy Loughman:	YES x	NO ___
B.	John Yesenosky and Linda Yesenosky:	YES ___	NO x
C.	Paul Kent and Mabel Kent:	YES ___	NO x
D.	James McIntyre and Glenna McIntyre:	YES ___	NO x
E.	Morris Levine Enterprises:	YES ___	NO x
F.	Levine Iron & Metal, Inc.:	YES ___	NO x
G.	James Hughes and Linda Hughes:	YES ___	NO x
H.	Mark Headlee and Charlotte Headlee:	YES ___	NO x
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES ___	NO x

49. Did defendant *Pollock, Pollock and Thomas* defraud any of the following:

A.	Dorothy Loughman:	YES ___	NO x
B.	John Yesenosky and Linda Yesenosky:	YES ___	NO x
C.	Paul Kent and Mabel Kent:	YES ___	NO x
D.	James McIntyre and Glenna McIntyre:	YES ___	NO x
E.	Morris Levine Enterprises:	YES ___	NO x
F.	Levine Iron & Metal, Inc.:	YES ___	NO x
G.	James Hughes and Linda Hughes:	YES ___	NO x
H.	Mark Headlee and Charlotte Headlee:	YES ___	NO x

Appendix F

I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES ___ NO X

50. Did defendant *Upshur Agency, Inc.* defraud any of the following:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___
F. Levine Iron & Metal, Inc.: YES X NO ___
G. James Hughes and Linda Hughes: YES X NO ___
H. Mark Headlee and Charlotte Headlee: YES X NO ___
I. Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton YES X NO ___

51. Did defendant *Consolidation Coal Co.* defraud any of the following:

A. Dorothy Loughman: YES X NO ___
B. John Yesenosky and Linda Yesenosky: YES X NO ___
C. Paul Kent and Mabel Kent: YES X NO ___
D. James McIntyre and Glenna McIntyre: YES X NO ___
E. Morris Levine Enterprises: YES X NO ___

Appendix F

F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

52. Did defendant *Consol-Land Development Co.* defraud any of the following:

A.	Dorothy Loughman:	YES X	NO ___
B.	John Yesenosky and Linda Yesenosky:	YES X	NO ___
C.	Paul Kent and Mabel Kent:	YES X	NO ___
D.	James McIntyre and Glenna McIntyre:	YES X	NO ___
E.	Morris Levine Enterprises:	YES X	NO ___
F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

53. Did defendant *Maria Theresia Bergbaugesellschaft* defraud any of the following:

A.	Dorothy Loughman:	YES ___	NO X

Appendix F

B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

54. Did defendant *Rheinische Braunkohlenwerke* defraud any of the following:

A.	Dorothy Loughman:	YES	___	NO	X
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

Appendix F

55. Did defendant *William Reese* defraud any of the following:

A. John Yesenosky and Linda Yesenosky: YES ___ NO X

B. James Hughes and Linda Hughes: YES ___ NO X

56. Did defendant *Mike Wilson* defraud:

A. James McIntyre and Glenna McIntyre: YES X NO ___

(END OF PART D)

PART E:

57. Did defendants Ewing Pollock or Pollock, Pollock and Thomas undertake to provide legal services on behalf of Dorothy Loughman?

YES X NO ___

(Answer question 58 *only* if your answer to Question 57 is YES. If your answer is NO, proceed to question 59.)

58. Did defendants Ewing Pollock or Pollock, Pollock and Thomas breach their duty of representation in rendering those legal services?

YES X NO ___

(END OF PART E)

PART F:

Appendix F

59. The amount of compensatory damages (if any) to be awarded to plaintiff Dorothy Loughman is: *$1,450,000.*

A. The percentage of this amount, if any, due to legal malpractice is: *100%*

60. The amount of compensatory damages (if any) to be awarded to plaintiffs John Yesenosky and Linda Yesenoski is: *$435,000.*

61. The amount of compensatory damages (if any) to be awarded to plaintiffs Paul Kent and Mabel Kent is: *$747,500.*

62. The amount of compensatory damages (if any) to be awarded to plaintiffs James McIntyre and Glenna McIntyre is: *$48,000.*

63. The amount of compensatory damages (if any) to be awarded to plaintiff Morris Levine Enterprises is: *$775,000.*

64. The amount of compensatory damages (if any) to be awarded to plaintiff Levine Iron & Metal, Inc. is: *$438,000.*

65. The amount of compensatory damages (if any) to be awarded to plaintiffs James Hughes and Linda Hughes is: *$122,000.*

66. The amount of compensatory damages (if any) to be awarded to plaintiffs Mark Headlee and Charlotte Headlee is: *$895,000.*

67. The amount of compensatory damages (if any) to be awarded to plaintiffs Carolyn Schultz, Colleen Abel, and Beth

Appendix F

Meighen, heirs of John Throckmorton is: *$450,000.*

(END OF PART F)

PART G:

68. Was the conduct of defendant *Consol-Pennsylvania Coal Co.* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES X	NO ___
B.	John Yesenosky and Linda Yesenosky:	YES X	NO ___
C.	Paul Kent and Mabel Kent:	YES X	NO ___
D.	James McIntyre and Glenna McIntyre:	YES X	NO ___
E.	Morris Levine Enterprises:	YES X	NO ___
F.	Levine Iron & Metal, Inc.:	YES X	NO ___
G.	James Hughes and Linda Hughes:	YES X	NO ___
H.	Mark Headlee and Charlotte Headlee:	YES X	NO ___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES X	NO ___

(Answer Question 69 *only* if you answered YES for any of the plaintiffs in Question 68.)

69. The amount of punitive damages to be assessed against defendant *Consol-Pennsylvania Coal Co.* is: *$400,000.*

70. Was the conduct of defendant *Rheinbraun U.S.* outrageous with respect to the following plaintiffs:

Appendix F

A.	Dorothy Loughman:	YES	___	NO	X
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

(Answer Question 71 *only* if you answered YES for any of the plaintiffs in Question 70.)

71. The amount of punitive damages to be assessed against defendant *Rheinbraun U.S.* is: $ —.

72. Was the conduct of defendant *Monongahela Railway Co.* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___

Appendix F

G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

(Answer Question 73 *only* if you answered YES for any of the plaintiffs in Question 72.)

73. The amount of punitive damages to be assessed against defendant *Monongahela Railway Co.* is: *$1,500,000.*

74. Was the conduct of defendant *David Boggs* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

Appendix F

(Answer Question 75 *only* if you answered YES for any of the plaintiffs in Question 74.)

75. The amount of punitive damages to be assessed against defendant *David Boggs* is: *$35,000.*

76. Was the conduct of defendant *Ewing Pollock* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
C.	Paul Kent and Mabel Kent:	YES	___	NO	X
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

(Answer Question 77 *only* if you answered YES for any of the plaintiffs in Question 76.)

77. The amount of punitive damages to be assessed against defendant *Ewing Pollock* is: *$10,000.*

78. Was the conduct of defendant *Pollock, Pollock and Thomas* outrageous with respect to the following plaintiffs:

Appendix F

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

(Answer Question 79 *only* if you answered YES for any of the plaintiffs in Question 78.)

79. The amount of punitive damages to be assessed against defendant *Pollock, Pollock and Thomas* is: *$25,000.*

80. Was the conduct of defendant *Upshur Agency* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___

Appendix F

G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

(Answer Question 81 *only* if you answered YES for any of the plaintiffs in Question 80.)

81. The amount of punitive damages to be assessed against defendant *Upshur Agency* is: *$275,000.*

82. Was the conduct of defendant *Consolidation Coal Co.* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

Appendix F

(Answer Question 83 *only* if you answered YES for any of the plaintiffs in Question 82.)

83. The amount of punitive damages to be assessed against defendant *Consolidaation Coal Co.* is: *$2,700,000.*

84. Was the conduct of defendant *Consol-Land Development Co.* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	X	NO	___
B.	John Yesenosky and Linda Yesenosky:	YES	X	NO	___
C.	Paul Kent and Mabel Kent:	YES	X	NO	___
D.	James McIntyre and Glenna McIntyre:	YES	X	NO	___
E.	Morris Levine Enterprises:	YES	X	NO	___
F.	Levine Iron & Metal, Inc.:	YES	X	NO	___
G.	James Hughes and Linda Hughes:	YES	X	NO	___
H.	Mark Headlee and Charlotte Headlee:	YES	X	NO	___
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	X	NO	___

(Answer Question 85 *only* if you answered YES for any of the plaintiffs in Question 84.)

85. The amount of punitive damages to be assessed against defendant *Consol-Land Development Co.* is: *$550,000.*

86. Was the conduct of defendant *Maria Theresia*

Appendix F

Bergbaugesellschaft outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	___	NO	x
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	x
C.	Paul Kent and Mabel Kent:	YES	___	NO	x
D.	James McIntyre and Glenna McIntyre:	YES	___	NO	x
E.	Morris Levine Enterprises:	YES	___	NO	x
F.	Levine Iron & Metal, Inc.:	YES	___	NO	x
G.	James Hughes and Linda Hughes:	YES	___	NO	x
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	x
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	x

(Answer Question 87 *only* if you answered YES for any of the plaintiffs in Question 86.)

87. The amount of punitive damages to be assessed against defendant *Maria Theresia Bergbaugesellschaft is:* $ —.

88. Was the conduct of defendant *Rheinische Braunkohlenwerke* outrageous with respect to the following plaintiffs:

A.	Dorothy Loughman:	YES	___	NO	x
B.	John Yesenosky and Linda Yesenosky:	YES	___	NO	x
C.	Paul Kent and Mabel Kent:	YES	___	NO	x

Appendix F

D.	James McIntyre and Glenna McIntyre:	YES	___	NO	X
E.	Morris Levine Enterprises:	YES	___	NO	X
F.	Levine Iron & Metal, Inc.:	YES	___	NO	X
G.	James Hughes and Linda Hughes:	YES	___	NO	X
H.	Mark Headlee and Charlotte Headlee:	YES	___	NO	X
I.	Carolyn Schultz, Colleen Abel, Beth Meighen, heirs of John Throckmorton	YES	___	NO	X

(Answer Question 89 *only* if you answered YES for any of the plaintiffs in Question 88.)

89. The amount of punitive damages to be assessed against defendant *Rheinische Braunkohlenwerke* is: $ —.

90. Was the conduct of defendant *William Reese* outrageous with respect to the following plaintiffs:

A.	John Yesenosky and Linda Yesenosky:	YES	___	NO	X
B.	James Hughes and Linda Hughes:	YES	___	NO	X

(Answer Question 91 *only* if you answered YES for any of the plaintiffs in Question 90.)

91. The amount of punitive damages to be assessed against defendant *William Reese* is: $ —.

92. Was the conduct of defendant *Mike Wilson* outrageous

Appendix F

with respect to the following plaintiffs:

A. James McIntyre and Glenna McIntyre: YES X NO ____

(Answer Question 93 *only* if you answered YES for any of the plaintiffs in Question 92.)

93. The amount of punitive damages to be assessed against defendant *Mike Wilson* is: *$5,000.*

(END OF PART G)

JURORS' SIGNATURES:

1. s/ Margaret Lynch
2. s/ Donald R. Kelly, Jr.
3. s/ Jack (illegible)
4. s/ Glenn H. Mantsik
5. s/ Susan E. Jozefowicz
6. s/ Arthur G. Beagle
7. s/ Helen Sayer
8. s/ (illegible)

Dated: February 23, 1987

(2)

No. 91-1561

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Cross-Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

JOSEPH D. BECKER
Counsel of Record
BECKER, GLYNN, MELAMED & MUFFLY
299 Park Avenue
New York, New York 10171
(212) 888-3033

JOSEPH A. KATARINCIC
KATARINCIC & SALMON
2600 CNG Tower
Pittsburgh, Pennsylvania 15222
(412) 338-2900

Attorneys for Cross-Respondents

April 7, 1992

QUESTIONS PRESENTED

1. Whether the grant to cross-respondents of judgment n.o.v. on cross-petitioners' claims of RICO fraud, affirmed by the Third Circuit, was correct in the circumstance that there was not any evidence from which the jury could have found that purchases by cross-respondents of cross-petitioners' lands over a ten-month period in order to assemble a single railroad right-of-way constituted a "pattern" of racketeering activity?

2. Whether cross-petitioners may now raise, for the first time, the question whether the sale of their lands to a railroad pursuant to negotiated contracts of sale constituted a "taking" of cross-petitioners' property for which "just compensation" (U.S. Const. amend. V), by way of accrued interest ("delay damages"), is due, when Pennsylvania rules of procedure deny such interest?

Parties to the Proceeding

The cross-petitioners are listed in the petition. (Pet. at ii).

The cross-respondents joining this brief are: Consol Pennsylvania Coal Company; Consolidation Coal Company; Consol Land Development Company; The Monongahela Railway Company; Greenon Coal Company; Rheinbraun A.G.; and Maria Theresia Bergbaugesellschaft mbH.

Other cross-respondents in the proceedings below were David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.; and William Reese.*

---

* Pursuant to Rule 29.1, we advise the Court that the corporate respondents are owned as follows:

Greenon Coal Company is a subsidiary of Consol Energy, Inc. The latter is a subsidiary of Du Pont Energy Company, Rheinbraun A.G., and Rheinbraun U.S. GmbH.

Du Pont Energy Company is a subsidiary of E.I. Du Pont De Nemours and Company.

Rheinbraun A.G. and Rheinbraun U.S. GmbH are subsidiaries of RWE AG.

Consolidation Coal Company is a subsidiary of Consol Energy Inc. Consol Land Development Company was merged into Consolidation Coal Company in 1987.

Consol Pennsylvania Coal Company is a subsidiary of Consolidation Coal Company.

Maria Theresia Bergbaugesellschaft mbH is subsidiary of Rheinbraun AG.

The Monongahela Railway Company is a subsidiary of Consolidated Rail Corporation.

The Upshur Agency, Inc., does not have a parent corporation.

TABLE OF CONTENTS

	Page
Table of Authorities	v
STATEMENT OF THE CASE	1
Introduction	1
The Facts	2
The First Trial	4
The Second Trial	5
Proceedings in The Third Circuit	5
REASONS FOR DENYING THE WRIT	6
Summary of Argument	6
I. THERE WAS NOT ANY EVIDENCE OF "CONTINUOUS" CONDUCT, PAST OR THREATENED, BY CROSS-RESPONDENTS	6
II. CROSS-PETITIONERS WERE NOT ENTITLED TO "DELAY DAMAGES" UNDER PENNSYLVANIA LAW, AND THE CONSTITUTIONAL CLAIM FOR "JUST COMPENSATION" IS FRIVOLOUS AND WAS WAIVED	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Air Courier Conf. of America v. America Postal Workers Union, AFL-CIO, 111 S. Ct. 913 (1991)	10
Bartichek v. Fidelity Union Bank/First National State, 832 F.2d 36 (3d Cir. 1987)	4
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc., 492 U.S. 257 (1989)	10
Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453 (5th Cir. 1991)	9n
Chase Manhattan Bank v. Malatesta, 1990 U.S. Dist. Lexis 9222 (S.D.N.Y. 1990)	9n
Dynabest v. Yao, 760 F. Supp. 704 (N.D. Ill. 1991)	9n
Feinstein v. Resolution Trust Corp., 942 F.2d 34 (1st Cir. 1991)	9n
Goodpasture v. Tennessee Valley Authority, 434 F.2d 760 (6th Cir. 1970)	12
H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)	*passim*
Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990)	9n
Kehr Packages, Inc. v. Fidelcor. Inc., 926 F.2d 1406 (3d Cir.), *cert. denied*, 111 S. Ct. 2839 (1991)	8n, 9n
Landry v. Air Line Pilots Association International, 901 F.2d 404 (5th Cir.), *cert. denied*, 111 S. Ct. 244 (1990)	8n

Cases	Page
Lane v. Peterson, 899 F.2d 737 (8th Cir.), *cert. denied*, 111 S. Ct. 74 (1990)	8n
Lange v. Hocker, 940 F.2d 359 (8th Cir. 1991)	9n
Olive Can Co. v. Martin, 906 F.2d 1147 (7th Cir. 1990)	9n
Parcoil Corp. v. Nowsco Well Service, Ltd., 887 F.2d 502 (4th Cir. 1989)	9n
Pyramid Securities Ltd. v. IB Resolution, Inc., 924 F.2d 1114 (D.C. Cir.), *cert. denied*, 112 S. Ct. 85 (1991)	8n, 9n
Seaboard Air Line Railway Co. v. United States, 261 U.S. 299 (1924)	11
Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507 (10th Cir. 1990)	9n
Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978)	11
Thompson v. Paasche, 950 F.2d 306 (6th Cir. 1991)	9n
United States v. Busacca, 739 F. Supp. 370 (N.D. Ohio 1990)	9n
United States v. Coiro, 922 F.2d 1008 (2d Cir.), *cert. denied*, 111 S. Ct. 2826 (1991)	8n, 9n
United States v. Hobson, 893 F.2d 1267 (11th Cir.), *cert. denied*, 111 S. Ct. 384 (1990)	9n
United States v. Link, 921 F.2d 1523 (11th Cir.), *cert. denied*, 111 S. Ct. 2273 (1991)	8n

Cases	Page
United States v. O'Connor, 910 F.2d 1466 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 953 (1991)	8n
STATUTES AND RULES	
18 U.S.C. §§1961-68 (1988 & Supp. 1989)	3
18 U.S.C. §1962(c) and (d) (1988 & Supp. 1989)	1
Fed. R. Civ. P. 50	9
Pa. R. Civ. P. 238	5, 10
MISCELLANEOUS	
G. Lefcoe, *Land Development Law* (1966)	11
2 *Nichols on the Law of Eminent Domain* §6.01 (J. Sackman ed. 1989)	11

No. 91-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Cross-Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

These cases turn on the *continuity* element of the RICO statute's prohibition of patterns of racketeering activity. 18 U.S.C. §1962(c) and (d) (1988 & Supp. 1989); *see H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (continuous misconduct necessary to establish RICO "pattern"). Contrary to findings of both courts below, cross-petitioners contend that the conduct of cross-respondents in question was continuous

in the sense of the RICO statute.[1] The RICO claims centered on representations made by respondents to induce sales of a linear series of parcels of land to assemble a railroad right-of-way near Waynesburg, Pennsylvania. As is shown below (*infra* at p. 7), two district judges found — and the Court of Appeals agreed — that contacts between petitioners and respondents lasted only for "a ten month period" (50a), and that respondents

> had but a single, discrete objective — namely, to purchase the right-of-way needed to build a rail line . . . The scheme was completed and came to an end once the necessary properties were acquired. (91a, 110a).

A subsidiary contention of petitioners is that their sales to a railroad were, in effect, "takings" for which "just compensation" is payable by respondents under the Fifth Amendment. The contention is frivolous and comes too late.

The petition should be denied because these issues were decided correctly below. Further, the continuity issue is fact-intensive and sui generis, without larger federal significance; the Court has denied the writ repeatedly in recent cases presenting the continuity issue (*infra* at p. 8, n.3).

The Facts

In stating the facts of these cases petitioners again indulge in the "rhetorical extravagance" for which they were faulted by the District Court. (87a, n.2). It is consequently necessary to restate facts that bring into focus the barren record upon which petitioners rely in contending that respondents' conduct possessed RICO continuity.

---

[1] The Court is advised that the "petition" (hereinafter "Pet.") arises from the same Third Circuit judgment as the petition in No. 91-1324, filed February 14, 1992, and should have been denominated a "cross-petition". To avoid confusion, the usage of cross-petitioners is followed herein: cross-petitioners will be referred to as "petitioners" and cross-respondents will be referred to as "respondents". References to pages of the Appendix are in the form "(____a)."

The frame of reference within which the facts must be considered is *H.J. Inc.*, 492 U.S. 229 (1989). The Court there held that RICO continuity involved alternative tests: continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition". *Id.* at 241. As will be seen, respondents engaged in neither type of conduct.

In 1981, respondents Consolidation Coal Company ("Consol"), a coal producer based in Pittsburgh, Pennsylvania, and Rheinbraun A.G., a coal producer of Cologne, Germany, and affiliates (collectively, the "Consol Respondents"), formed a joint venture to develop coal reserves near Waynesburg, Pennsylvania. The mine was to be located near the junction of a railroad operated by the Monongahela Railway Company ("Monongahela"). Construction of a spur on a right-of-way running from the mine to the junction was necessary. As planned, the right-of-way traversed over 50 parcels of largely vacant rural and farm land, including properties of petitioners.

Respondent Upshur Agency, Inc. ("Upshur"), a real estate agency, was retained to negotiate with petitioners (and other owners) for the acquisition by the Monongahela of necessary parcels. Negotiations with petitioners started in September, 1981, (50a), when Upshur began to acquire options to purchase a number of the properties along the right-of-way. By June, 1982, ten months later, all necessary properties were acquired by purchase from petitioners and others. (50a). Contrary to repeated assertions by petitioners (Pet. 4, 5, 7, 8, 24), there was not any evidence that a second right-of-way was being sought by respondents. (90a) (*infra* at p. 7).

In early 1983, petitioners filed eight actions in the United States District Court for the Western District of Pennsylvania against the Consol Respondents, the Monongahela, and others. Petitioners alleged fraud and conspiracy under the RICO statute, 18 U.S.C. §§1961-68 (1988 & Supp. 1989), and at common law, perpetrated by respondents during negotiations for the purchase of their parcels. The frauds alleged included false statements

that the Monongahela had powers of eminent domain, that only the Monongahela, and not Consol, was involved in the purchases, and that part of the purchase price would be tax-free to some petitioners. Petitioners demanded compensatory and punitive damages.

The First Trial

The cases were consolidated and tried to a jury in early 1987. Judge Hubert I. Teitelbaum presided.

Before the trial, on respondents' motions for partial summary judgment, Judge Teitelbaum held that Upshur's representations that the Monongahela had condemnation powers were true, a holding duly affirmed by the Third Circuit. (51a-56a).

On the remaining claims the jury found most of respondents liable as alleged. It valued petitioners' properties, in the aggregate, at $5,360,500 more than the prices paid; that amount was awarded as compensatory damages and trebled under RICO. The jury also awarded punitive damages in the aggregate amount of $5,500,000 against specific respondents. (43a).

But on respondents' post-trial motions the judge, on October 22, 1987, granted judgment n.o.v. to all respondents on the RICO claims, holding that there was not any evidence of ongoing misconduct by respondents beyond the short period of contact between the parties, which had "a discrete temporal ending point". (110a). With respect to surviving claims of common law fraud, the judge set aside the resulting award as "obscenely excessive" (105a, 112a) and ordered a new trial on damages only.

Thereafter, the Third Circuit decided an unrelated case on grounds that appeared — mistakenly, as events proved — to undermine Judge Teitelbaum's analysis. *Bartichek v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987). On petitioners' motion for reconsideration, therefore, Judge Teitelbaum reinstated their RICO claims. (94a).

The cases were now assigned to Judge D. Brooks Smith. In light of the Court's decision in *H.J. Inc.*, 492 U.S. 229 (1989),

which defined the continuity requirement in terms that excluded respondents' conduct, Judge Smith again dismissed petitioners' RICO claims. (80a). In answer to petitioners' contention — repeatedly and falsely advanced here (Pet. 4, 5, 7, 8, 24) — that there was evidence adduced to the first jury that respondents' conduct threatened to continue by the assembly of a *second* right-of-way, Judge Smith searched the record of the first trial and concluded that "the jury was not presented any evidence that any additional right-of-way would be required by the defendants [respondents] after the spur in question was completed." (90a).

The Second Trial

On March 6, 1990, a second jury trial, limited to damages recoverable for common law fraud, commenced before Judge Smith. On April 6, 1990, the second jury awarded compensatory damages of $4,262,677 and punitive damages of only $674,000.

Respondents' post-trial motions for judgment n.o.v. and for a new trial were denied by Judge Smith.

Proceedings in the Third Circuit

Petitioners and respondents appealed to the Third Circuit. Petitioners sought (among other matters) the reinstatement of their RICO claims and an award of "delay damages" (i.e., interest from the date of the filing of the complaints) under Rule 238 of the Pennsylvania Rules of Civil Procedure; the Rule authorizes such damages only in cases of "bodily injury, death, or property damage".

The Court of Appeals affirmed the dismissal of petitioners' RICO claims and the denial to petitioners of delay damages. In respect of the common law claims, however, the Third Circuit vacated the second jury's award in its entirety and reinstated the first award of compensatory and punitive damages. *Hughes v. Consol Pennsylvania Coal Co.*, No. 90-3466 (3d Cir. Dec. 20, 1991) (amended opinion) (1a).

REASON FOR DENYING THE WRIT

Summary of Argument

Scrutiny of the record of the first trial by five judges (two in the District, three in the Circuit) resulted in their holdings that there was not any evidence from which a jury could find continuous RICO misconduct by respondents. Moreover, the fact-intensity of the continuity issue precludes useful review by this Court, and the writ should be denied in accordance with the Court's recent practice of declining review of that issue.

The contention that petitioners are entitled to delay damages by way of "just compensation" for a "taking" under the Fifth Amendment is frivolous and comes too late.

I.

THERE WAS NOT ANY EVIDENCE OF "CONTINUOUS" CONDUCT, PAST OR THREATENED, BY RESPONDENTS.

The Court of Appeals, in reviewing the evidence bearing on the continuity issue, construed "the evidence in a light most favorable to petitioners and search[ed] the record for the minimum quantum of evidence to support the [first] jury verdict." Affirming the District Court, the Third Circuit concluded: "Here we cannot find the minimum quantum of evidence to support continuity." (45a).

First, as to closed-ended conduct, the search of the record by the appeals court confirmed the findings of District Judge Teitelbaum (after the first trial) and District Judge Smith (before the second):

> Reviewing the record Judge Teitelbaum made the correct factual finding: Defendants' [respondents'] scheme "lasted from July 1981 until sometime in early-1982." [citation]. More precisely, Judge Smith found the scheme lasted from June 1981 to June 1982. [citation]. *In fact plaintiffs testified that contacts with*

> *Upshur agents — the source of these actions — started about September 1981 and ended in June 1982, a ten month period.* (49a-50a) (emphasis supplied).

The Court of Appeals concluded that,

> [a]ll the evidence points to a short term operation. . . . [*There was] no intent to acquire more land than originally contemplated*. . . .When the defendants [respondents] acquired all the property in the areas of interest, the fraud was complete. In short, defendants worked a single-scheme, single-victim (albeit a class of victims) operation that lasted one year at most. (50a) (emphasis supplied).

On this evidence, a jury finding of closed-ended conduct was precluded.

As for "open-ended" conduct, both district judges and the Court of Appeals agreed there was none that a jury could find. In answer to petitioners' contention that respondents intended to acquire not only the right-of-way running to the first mine, but a second right-of-way thereafter — a contention unsuccessfully advanced in the Court of Appeals and incautiously here (*Pet.* at 4, 5, 7, 8, 24) — Judge Smith held:

> Contrary to plaintiffs' argument, however, *the* [first] *jury was not presented any evidence* that any additional right-of-way would be required by the defendants after the spur in question was completed. (90a) (emphasis supplied).

Judge Smith agreed with (and quoted) Judge Teitelbaum's original view that "defendants had but a single, discrete objective - namely, to purchase the right-of-way needed to build a rail line. . . .*The scheme was completed and came to an end once the necessary properties were acquired.*" (91a, 110a). The Court of Appeals affirmed:

> There were no "potential" areas of interest. Once defendants obtained the property, they posed no future threat to plaintiffs or society. (49a).
>
> [There was] no intent to acquire more land than originally contemplated. (50a).

This review of the record by five judges demonstrates that there was neither closed-ended nor open-ended conduct; hence, there was no continuity, no "pattern", and no violation of RICO. These issues were correctly decided below.[2]

Further, the Court has recognized the fact-intensity of the continuity issue; that the dual standard of continuity must be applied to multifarious facts. *See H.J. Inc.*, 492 U.S. at 242 (continued racketeering activity "depends on the specific facts of each case"). Petitioners do not question the Court's formulation of the continuity standard, seeking, merely, review of the application of the standard to the peculiar facts of these cases. The Court has repeatedly declined to grant the writ for the purpose of reviewing whether the facts establish continuity (or other elements of a "pattern of racketeering activity").[3]

---

[2] Petitioners make much of exhibits (Pet. at 4, 8, 24) that, they claim, show that respondents planned to build "a second 6-mile track line" to another coal reserve. (*Id.* at 24). The exhibits, which are not annexed to the petition, show no more than that respondents conceived of the possibility that at some remote future, undefined date respondents might begin to extend the right-of-way purchased from petitioners and others. The exhibits were considered by the courts below and dismissed as non-probative. (49a-50a, 90a).

[3] *See, e.g., United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 111 S.Ct. 2826 (1991); *Kehr Packages, Inc. v. Fidelcor. Inc.*, 926 F.2d 1406, 1417 (3d Cir.), *cert. denied*, 111 S.Ct. 2839 (1991); *Landry v. Air Line Pilots Assn. Intl.*, 901 F.2d 404, 432-33 (5th Cir.), *cert. denied*, 111 S.Ct. 244 (1990); *United States v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 953 (1991); *Lane v. Peterson*, 899 F.2d 737, 744-45 (8th Cir.), *cert. denied*, 111 S.Ct. 74 (1990); *United States v. Link*, 921 F.2d 1523, 1527 (11th Cir.), *cert. denied*, 111 S.Ct. 2273 (1991); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117-20 (D.C. Cir.), *cert. denied*, 112 S.Ct. 85 (1991).

In a misconceived effort to create a reviewable issue, petitioners argue that post-*H.J., Inc.* cases in the circuit courts have mistakenly adopted "rigid time limits" in determining the continuity element of RICO's "pattern" requirement (Pet. 17-18). To bolster this argument, petitioners cite three *district* court cases, none of which establishes "rigid time limits."[4] Indeed, a review of circuit court cases decided since *H.J., Inc.* confirms that the courts have adhered to this Court's holding that the continuity issue is fact-specific and therefore cannot be governed by "rigid time limits."[5]

Finally, petitioners, agreeing that the continuity issue is fact-intensive, argue from that proposition that the issue is exclusively a jury matter. (Pet. 20-21). There is no authority for so radical a view. Motions for judgment n.o.v. (and for a directed verdict) are part and parcel of the jury system, whether in RICO or other cases at law. Fed. R. Civ. P. 50.

---

[4] The courts in the cases cited by petitioners each acknowledged that this Court in *H.J., Inc.* required the application of a flexible, fact-specific approach. *See United States v. Busacca*, 739 F. Supp. 370, 377 (N.D. Ohio 1990) ("The determination of whether the predicate acts show sufficient continuity is fact specific. Prior case law provides guidance, but no clear bright line test."); *Dynabest v. Yao*, 760 F. Supp. 704, 710 (N.D. Ill. 1991) (court indicates that *H.J., Inc.* requires application of a "flexible approach."); *Chase Manhattan Bank v. Malatesta*, 1990 U.S. Dist. Lexis 9222 (S.D.N.Y. 1990) (In *H.J., Inc.*, "the [Supreme] Court rejected the rigid test applied by the Eighth Circuit.")

[5] *See, Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45-46 (1st Cir. 1991); *United States v. Coiro*, 922 F.2d 1008, 1016-17 (2d Cir.) *cert. denied*, 111 S. Ct. 2826 (1991); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1412 (3rd Cir.), *cert. denied*, 111 S. Ct. 2839 (1991); *Parcoil Corp. v. Nowsco Well Service, Ltd.*, 887 F.2d 502, 503-04 (4th Cir. 1989); *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461-62 (5th Cir. 1991); *Thompson v. Paasche*, 950 F.2d 306, 310-11 (6th Cir. 1991); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1150-51 (7th Cir. 1990); *Lange v. Hocker*, 940 F.2d 359, 361 (8th Cir. 1991); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990); *United States v. Hobson*, 893 F.2d 1267, 1268-69 (11th Cir.), *cert. denied*, 111 S. Ct. 384 (1990); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117-20 (D.C. Cir.), *cert. denied*, 112 S. Ct. 85 (1991).

II

PETITIONERS WERE NOT ENTITLED TO DELAY DAMAGES UNDER PENNSYLVANIA LAW, AND THE CONSTITUTIONAL CLAIM FOR "JUST COMPENSATION" IS FRIVOLOUS AND WAS WAIVED.

Petitioners contend that they were entitled to what Pennsylvania law terms "delay damages" in addition to the compensatory damages awarded by the first jury. Under Rule 238 of the Pennsylvania Rules of Civil Procedure, interest is awarded from the date of the complaint on compensatory damage awards arising from "bodily injury, death or property damage." (62a). As petitioners' damages did not so arise but arose "from fraud in the making of contracts", Judge Smith held that Rule 238 did not apply, disagreeing with Judge Teitelbaum on the point. (76a). The Court of Appeals agreed with Judge Smith and dismissed petitioners' contention peremptorily. (62a).

Petitioners go on to argue that the denial of delay damages was an unconstitutional denial of just compensation under the Fifth Amendment "since it denies a property owner interest on property acquired pursuant to a condemnation scheme. . . ." (Pet. at 15).[6]

As a procedural matter, the argument was not advanced in either court below and surely is excluded from consideration here. *See Air Courier Conf. of America v. America Postal Workers Union, AFL-CIO*, 111 S.Ct. 913, 917 (1991) (Rehnquist Ch.J.) (contention not advanced in either lower court not reviewable); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 277 (1989) (same).

---

[6] Petitioners undoubtedly mean to refer to the Fourteenth Amendment; the Monongahela is not a federal entity.

As a substantive constitutional matter the frivolity of the argument is plain. The issue is simply one of Pennsylvania law. It cannot be puffed up into a constitutional matter as a "taking" of private property for public use without just compensation. (Pet. at 15). For if there is any fact that is beyond debate it is that petitioners' lands were not "taken" under eminent domain procedures but were purchased for an agreed price under negotiated contracts of sale and deeds of conveyance. The complaints alleged fraudulently induced *sales* of property. (85a). The courts below found that the transactions between petitioners and respondents were "negotiated"; petitioners "sold" their parcels to the Monongahela. (42a). The negotiations were sometimes heated (Pet. at 11) but they were negotiations nevertheless, leading to contracts of sale, not condemnations. Petitioners concede as much: "despite so many representations about the eminent domain power, *no land was ever condemned*". (Pet. at 12) (italics in original). That concession removes from consideration petitioners' reliance on *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1924) (*Pet.* at 15, 18), an authentic case of condemnation by the United States.

To be sure, petitioners sold their properties to the Monongahela, which, the courts below held, had condemnation powers. (51a-56a). Such sales to railroads and other authorities with the power of eminent domain are commonplace. "Most - perhaps ninety-eight percent - of the land acquired by eminent domain is obtained without litigation, by private negotiation; hence, without constitutional disputes." G. Lefcoe, *Land Development Law* 108 (1966). A *sale* to a governmental authority is consequently deemed an ordinary commercial transaction, not a transaction in which the sovereign acts as such. "The constitutional provision which prohibits taking of property for public use without compensation . . . has no application to the decision of a court upon the relative rights in property of parties litigant which have been *voluntarily created by contract* . . . ." 2 *Nichols on the Law of Eminent Domain* §6.01 (J. Sackman ed. 1989) (emphasis supplied); *see Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (denial by Department of Interior to

lessee of license to drill under oil and gas lease granted by Department is ordinary breach, not "taking" by sovereign). Indeed, a condemnor's assertion that it will use its powers of condemnation if a contract of sale cannot be negotiated does not affect the validity of the contract. *See Goodpasture v. Tennessee Valley Authority*, 434 F.2d 760, 763-64 (6th Cir. 1970) (statement by T.V.A. that it will condemn if sale not negotiated, not duress).

By the same token the contracts under which the Monongahela purchased petitioners' lands, and the circumstances surrounding the contracts, involved non-governmental activity to which the Fifth and Fourteenth Amendments do not apply.

CONCLUSION

The petition should be denied. The decision below was correct: the first jury could not properly have found respondents guilty of continuous acts of RICO misconduct; the courts below rightly denied "delay damages" to petitioners; and the "just compensation" claim is frivolous and was waived. Further, the petition concerns a peculiar constellation of facts that does not present any issue of general federal importance.

Respectfully submitted,

JOSEPH D. BECKER
Counsel of Record
BECKER, GLYNN, MELAMED & MUFFLY
299 Park Avenue
New York, NY 10171
(212) 888-3033

JOSEPH A. KATARINCIC
KATARINCIC & SALMON
2600 CNG Tower
Pittsburgh, Pa. 15222
(412) 338-2900

Attorneys for Cross-Respondents

April 7, 1992.

(3)

Supreme Court, U.S.
FILED
APR 20 1992
OFFICE OF THE CLERK

No. 91-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

LOUIS M. TARASI, JR.
Counsel of Record
TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219
(412) 391-7135

DAVID C. HOOK
Fort Jackson Building
Waynesburg, PA 15379
(412) 627-6146

Attorneys for Petitioners

TABLE OF CONTENTS

Page

Table of Authorities

INTRODUCTION 1

A. *EMINENT DOMAIN DELAY COMPENSATION - AN UNWAIVABLE CONSTITUTIONAL RIGHT* 2

B. *CONTINUITY AS IT RELATES TO THE RICO STATUTE MUST BE VIEWED BY A FLEXIBLE STANDARD. OTHERWISE, A RIGID TIME PERIOD USED TO DEFINE CONTINUITY WILL ESTABLISH PERIODS OF SAFE HARBORS SUCH AS A TWELVE MONTH PERIOD FOR FREE RACKETEERING ACTIVITY* 4

CONCLUSION 6

TABLE OF CITATIONS

Cases Cited: **Page**

Com. v. 21.1 Acres of Land in Washington Twp.,
61 Pa.Cmwlth. 383, 433 A.2d 915 (1983). 2

H.J. Inc. v. Northwestern Tel. Co.,
492 U.S. 229, 109 S.Ct. 2900 (1989) 2, 5

Hassett v. Commonwealth of Pennsylvania, Department of Transportation,
34 Pa.Cmwlth. 368, 384 A.2d 594 (1978) 3

In Re Condemnation by City of Philadelphia, ETC.,
40 Pa.Cmwlth. 409, 398 A.2d 224 (1979) 4

Seaboard Air Line Railway Company, et al. v. United States, 261 U.S. 299, 43 S.Ct. 354,
67 L.Ed. 664 (1924) 2

Township of Ridley v. Forde,
73 Pa.Cmwlth. 611, 459 A.2d 449 (1983) 2, 4

Statute Cited:

18 U.S.C. Sec. 1961, et seq 2, 5

Rules Cited:

Sup. Ct. R, 12.2 2
Sup. Ct. R. 13.4 2

Other Authorities Cited:

Pennsylvania Eminent Domain Code,
Act of June 22, 1964, Special Sess.,
P.L. 84, as amended, 26 P.S. Sec. 10611 3

No. 91-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. HUGHES, et al.,

Petitioners,

VS.

CONSOL PENNSYLVANIA COAL COMPANY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondents distort the facts of this case and conveniently twist and misrepresent the procedural posture of the matters before this Supreme Court.

First, this Court was ill advised by Respondents' contention that Petitioners' petition is a cross-petition. This petition docketed at 91-1561 is and is intended to be a petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit independent of

the Petition filed by Respondents at 91-1324[1]. See Sup. Ct. R. 12.2, 13.4.

Second, as is stated hereinafter, once the district court and the Third Circuit decided that the Monongahela had the power to condemn the petitioners' property, these courts were without jurisdiction to decide the issue of eminent domain delay damages for such damages are not properly before the court until the time of payment of the award or judgment.

Finally, the flexible approach referred to in the text of the RICO statute, the legislative history of congress, and the references in *H.J. Inc.*, is being disregarded by the circuit courts and the circuit courts are rigidly interpreting what period of time amounts to a pattern.[2]

The petition should be granted to protect the constitutional law on just compensation and restore the flexible interpretation of what constitutes a pattern under the RICO Statute.

A. *EMINENT DOMAIN DELAY COMPENSATION - AN UNWAIVABLE CONSTITUTIONAL AND LEGAL RIGHT*

Respondents' brief in opposition (Br.Opp.) to the petition is profoundly mistaken in asserting that the constitutional and legal right to eminent domain delay compensation can or has been waived. In *Seaboard* this Court held that just compensation includes interest for delay.[3] A condemnee is entitled to delay compensation as a matter of right.[4]

Under the statutory Pennsylvania law addressing eminent do-

---

1 The Supreme Court consolidated these cases on March 31, 1992.

2 18 U.S.C. Sec. 1961, et seq.; *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

3 *Seaboard Air Line Railway Company, et al. v. United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1924).

Additionally, the Appellate Courts of the Commonwealth of Pennsylvania have held that the matter of the granting of eminent domain delay damages is a matter of right and law. See: *Com. v. 21.1 Acres of Land in Washington Twp.*, 61 Pa.Cmwlth. 383, 433 A.2d 915 (1983).

4 The issue of delay compensation in the context of this de facto taking was raised before the Third Circuit in petitioners' Petition for Rehearing.

main delay compensation as a matter of law the controlling Eminent Domain Code provides as follows:

Sec. 611. *Delay Compensation.*

> ..."Compensation for delay shall not be included by the viewers, *or the court or jury, on appeal as part of the award or verdict,* but *shall at the time of payment of the award or judgment be calculated as above* and added thereto." [Emphasis Added]. *Pennsylvania Eminent Domain Code*, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. Sec. 1-611.

The law is clear, delay compensation is a matter of right and is a justiciable issue only at the time of payment of the award or judgment. No payment has been made on the award or judgment in this proceeding. Nothing concerning this matter has been waived. The lower courts erred in their analysis that delay damages were not appropriate because the trial court at the time did not have the jurisdiction to decide the eminent domain delay compensation issue.

Petitioners in both lower courts hotly contested the issue as to whether or not respondent Monongahela Railroad had the power to condemn on the facts of this case. The lower courts disagreed and held that Monongahela Railroad had the power to condemn these petitioners' property. The Pennsylvania Eminent Domain Code provision of Section 611 applies even though the de facto condemnation was affected by a public utility.[5]

Now that this has been held, the respondents must pay delay damages as a matter of constitutional right and law. The Pennsylvania Courts hold that delay damages must be paid whether or not condemnation takes place or whether or not the property is voluntarily conveyed, as long as it is acquired under the power to condemn. See *Township of Ridley*, cited below.

Both the District Court and the Third Circuit held that respondent railroad had the power to condemn. Moreover, respondents purchased the property required for the railroad right-of-way in the name of the

---

[5] *Hassett v. Commonwealth of Pennsylvania, Department of Transportation*, 34 Pa.Cmwlth. 368, 384 A.2d 594 (1978).

railroad as grantee. The deed of one of the landowners contained the covenant that the conveyance was made "in lieu of condemnation".[6] Respondents agree that they were acquiring the petitioners' property under the guise, power and right of condemnation and that such power would be exercised unless a sale of the property was agreed to under the unilateral offer of respondents. Now respondents conveniently reverse their position and argue that these sales were voluntary. This contention makes no difference under the law. But this contention defies logic in the light of the overwhelming evidence of fraud and outrageous conduct engaged in by the respondents in acquiring the petitioners' property (petition at 8-13 and Br.in Opp. no.91-1324 at 3-7). These land sales were not arms-length transactions, they were sales procured by fraud and duress under the threat of eminent domain. The petitioners successfully proved in the courts below that they were not paid the just compensation they were entitled for their property. The compensation owed for delay now constitutionally follows when the award or judgment is paid.[7]

A de facto condemnor cannot be permitted to take property through fraud and duress based upon the threatened exercise of the power of eminent domain without paying the just compensation that a de jure condemnor taking property without fraud and duress, would have to pay. This unconstitutional and unlawful misapplication of the law by the courts below must be remedied by this Supreme Court by granting petitioners' petition and directing the defendants to pay this delay compensation as required by law.

B. *CONTINUITY AS IT RELATES TO THE RICO STATUTE MUST BE VIEWED BY A FLEXIBLE STANDARD. OTHERWISE, A RIGID TIME PERIOD USED TO DEFINE CONTINUITY WILL ESTABLISH PERIODS OF SAFE HARBORS SUCH AS A TWELVE MONTH PERIOD FOR FREE RACKETEERING ACTIVITY.*

---

[6] TR1 Ex. 99, The Phillippi Deed, at page 3 states: "This deed is given by parties of the first part to parties of the second part in lieu of condemnation of the within property by party of the second part."

[7] *In Re Condemnation By City of Philadelphia, ETC.*, 40 Pa.Cmwlth. 409, 398 A.2d 224 (1979); *Township of Ridley v. Forde*, 73 Pa.Cmwlth. 611, 459 A.2d 449 (1983).

The flexible approach referred to in the text of the RICO Statute, the legislative history of Congress and the references in *H.J. Inc.* is being disregarded by the circuit courts. The circuit courts are ignoring the totality of the circumstances and rigidly interpreting what period of time amounts to a pattern.[8] This rigid time analysis is creating a huge loophole for violators of the RICO Statute, i.e., twelve months of RICO violations are for free.

The jury hearing and deciding the case below made the factual determination that the respondents were guilty of RICO violations (petition at 121a-136a). In overturning this jury verdict the lower courts ignored the record and evidence upon which the jury based its verdict.[9]

This massive scheme to defraud the petitioners and the more than 52 property owners of their land was *not* a scheme of activity planned and implemented in a short period of time. It was a well developed conspiracy to illegally obtain property which was planned over several years (petition at 4-9). The holding and reasoning of the Third Circuit allows coconspirators of a well planned and conceived pattern of racketeering to commence the previously planned illegal activity in month number one and end on month number twelve without any RICO violations and escape RICO because of their efficiency. This rigid time approach encourages efficient "arrangement(s) or order of things or activity" carefully planned and then implemented quickly or within one year.[10]

Moreover, and contrary to respondents' distortion of inconvenient facts, the record is replete with references to the construction of a second six mile right-of-way (TR1 Ex. 126 outlines the budget and specifics of the Manor right-of-way, the 14.6 mile finished rail line and the Nineveh right-of-way, the 6 mile unconstructed rail line; TR1 Ex. 137 a map of the area in question testified to and showing the unfinished 6 mile right of way; TR1 Ex. 40,29 the letters discussing the unfinished 6 mile right of way; and the jury was shown this unfinished section during a view).

---

8 18 U.S.C. Sec. 1961, et seq.; *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

9 Judge Tietlebaum who presided over the first trial found that continuity under *Barticheck* was proven. Judge Smith who was later assigned to the case for the second trial on damages reversed Judge Tietlebaum's ruling. See petition at 14.

10 See *H.J. Inc.*, 109 S.Ct. at 2900.

With so much evidence of this second right-of-way, the jury came to the correct conclusion in finding these respondents liable for RICO violations based upon evidence showing a future threat of a continuing pattern of racketeering.

With this case as the law, respondents and others have a blueprint to follow when they engage in criminal conduct (i.e., planning to acquire the needed parcels for the 6 mile right of way in a twelve month time period). Future RICO violators can begin their plan for future unfinished activity, and avoid RICO violations by later effectuating the previosuly planned scheme in one year. This defeats the purpose of the RICO statute and creates a hugh loophole for these respondents and others to engage in RICO activities without any penalty.

CONCLUSION

This Supreme Court should grant petitioners' petition to rectify, clarify and protect the law as set forth herein and in the petition docketed at 91-1561.

Respectfully submitted,

LOUIS M. TARASI, JR.
Counsel of Record
TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219
(412) 391-7135

DAVID C. HOOK
Fort Jackson Building
Waynesburg, PA 15379
(412) 627-6146

Attorneys for Petitioners

April 20, 1992